THE NORTHERN IRELAND LAW REPORTS

1944.

THE

NORTHERN IRELAND LAW REPORTS

CONTAINING

REPORTS OF CASES ARGUED AND DETERMINED

IN

THE HIGH COURT OF JUSTICE

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL

IN

NORTHERN IRELAND

EDITED BY

M. G. ELLISON,

ONE OF HIS MAJESTY'S COUNSEL.

1944

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CORRIGENDA.

Page 11. Line 18. For "accident" read "action."
Page 32. Line 22. For 1909 read 1904.

TABLE OF CASES REPORTED

IN THIS VOLUME

B.

Beggs, *In re* 121
Bracewell, Cullen *v.* .. 78
Belfast Corporation, McIlhagger *v.* 37
Burns & Laird Lines, Ltd., Hugh Mack & Co., Ltd., *v.* 106

C.

Cairns, Nixon *v.* 21
Cullen *v.* Bracewell 78
Cullen *v.* Dale 78

D.

Daily, Michael, *In re* .. 1
Dale, Cullen *v.* 78

F.

Firman *v.* Malocca 91

G.

Galway, *In re* 28
Galway *v.* Incorporated Cripples' Institutes .. 28

H.

Hugh Mack & Co., Ltd. *v.* Burns and Laird Lines, Ltd. 106

I.

Incorporated Cripples Institutes, Galway *v.* .. 28

M.

McBride *v.* Stitt 7
McIlhagger *v.* Belfast Corporation 37
Mason *v.* Mason 134
Mason, Mason *v.* 134
Michael Daily, *In re* .. 1
Molacca, Firman *v.* 91

N.

Nixon *v.* Cairns 21
Northern Ireland Road Transport Board, (R.) Hendron *v.* 48

R.

R. (Hendron) *v.* Northern Ireland Road Transport Board 48
Russell, Appellant, Scott, Respondent 57

S.

Scott, Respondent, Russell, Appellant 57
Stitt, McBride *v.* 7

TABLE OF CASES CITED.

PAGE

A.

A. *v.* B. 153
Ackroyd *v.* Smithson 34
Adams *v.* Adams 141
Alexander *v.* Anderson .. 12
Alice Woodhall, *ex p.* 97
Anghinelli *v.* Anghinelli .. 137
Amand *v.* Home Secretary and Minister of Defence of Netherlands 97
Armytage *v.* Armytage .. 137
Attorney-General *v.* Radloff .. 99
Attorney-General of Alberta *v.* Cook 139

B.

B. (alias A.) *v.* B. 141
Barker, decd., *In re* 34
Barnard *v.* Gorman 93
Baxter's Leather Co. *v.* Royal Mail Steam Packet Co. .. 111
Bell *v.* Kennedy 138
Bolina, The 10
Brown *v.* National Provident Institution 72

C.

Carden *v.* Carden 133
Chaplin, *ex p.* 32
Chapman *v.* Bradley 172
City of London Commissioners *v.* Gibbs 67
Collett *v.* Collett 144
Coltness Iron Co. *v.* Black .. 67
Commissioners of Inland Revenue *v.* Forth Conservatory Board 66
Cooper *v.* Cooper 137
Cox *v.* Hakes 121
Craig *v.* Kanssen 81

D.

Denn & Manifold *v.* Diamond 67
Devitt *v.* Glasgow and Dublin Steam Packet Co., Ltd. .. 111
Diamond Alkali Export Corporation 113
Dodworth *v.* Dale 163
Dorrian *v.* McHugh 81
Dunbar *v.* Dunbar 140
Dunn, *In re* 122

E.

Easterbrook *v.* Easterbrook .. 139
Edinburgh Southern Cemetery Co. *v.* Kinmont 62

PAGE

Edmonds *v.* Eastwood .. 62
Ellor *v.* Selfridge & Co. .. 12
Elliot *v.* Gurr 140
Employees Murray, Sons & Co., Ltd. *v.* Murray, Sons & Co., Ltd. 56
Eshugbazi Eleko *v.* Officer Administering the Government of Nigeria 125
Eustace *v.* Eustace 139

F.

Fender *v.* St. John-Mildmay .. 141
Fernandez, *ex p.* 131
Fielding *v.* Turner 86
F.
Firebrace *v.* Firebrace .. 137
Fitch *v.* Weber 34
Fowke *v.* Fowke 141
Francis 81
Fry *v.* Salisbury House Estate, Ltd. 66

G.

G. *v.* M. 163
Galene *v.* Galene 139
Galway *v.* Incorporated Cripples' Institutes 28
Graham *v.* Graham 137
Grand Trunk Railway .. 23
Gosse Millerd *v.* Canadian Government Merchant Marine 111

H.

Halliwell *v.* Venables 12
Harford *v.* Morris 148
Harland & Wolff *v.* Burns & Laird Lines, Ltd. 114
Harris *v.* Perry 23
Henderson *v.* Glasgow Corporation 41
Herd *v.* Herd 139
Houghton *v.* Pilkington .. 24
Hopkinson, *Re* 34
Houghton *v.* Pilkington .. 24
Hugh Mack & Co., Ltd. *v.* Burns & Laird Lines, Ltd. .. 107
Hughes *v.* Lennon 122
Humber Conservancy Board *v.* Bater 64
Hussein *v.* Hussein 139
Hyams *v.* Stuart King .. 116

I.

Inverclyde (otherwise Tripp) *v.* Inverclyde 136

J.

	PAGE
Janson *v.* Driefontein Consolidated Mines, Ltd.	116
Johnston *v.* Cooke	139

K.

Keelan *v.* Garvey	4

L.

Laurie *v.* Raglan Building Co., Ltd.	20
Lees, *ex p.*	122
Le Mesurier *v.* Le Mesurier ..	138
Letang *v.* Ottawa Railway Co.	43
Lewis *v.* Hayward	140
Liffen *v.* Watson	14
Linke *v.* Van Aerde	139
London Cemetery Co. *v.* Barnes	70
Lord Advocate *v.* Jaffrey ..	139

M.

McAleece, *In re*..	131
Malone's Divorce Bill ..	139
McGowan *v.* Stott	12
Marpesia, The 10,	17
Mellor *v.* Durham	97
Membery *v.* Great Western Railway Co.	44
Merchant Prince, The	10
Mitford *v.* Mitford	139
Munro *v.* Kelly	81

N.

Naismith *v.* London Film Production, Ltd.	41
Napier *v.* Napier	140
Newbould *v.* Attorney-General	141
Niboyet *v.* Niboyet	137
Norman *v.* Villars	140

O.

Ogden *v.* Ogden	139
Ormond Investment Co. *v.* Betts	67

P.

P. *v.* P.	163
Pennington *v.* Pennington (otherwise Neumann) ..	159

Q.

Quinn *v.* Pratt	81

R.

R. *v.* Army Council, *ex p.* Ravenscroft	53
R. *v.* Cleworth	76
R. (Sherry) *v.* County Court Judge of Fermanagh ..	92
R. *v.* Crockett	121
R. *v.* Davies	121
R. *v.* Dibdin	140
R. *v.* Governor of Lewes Prison	128
R. *v.* Governor of Maidstone Prison	128

	PAGE
R. *v.* Hausman	100
R. (Lockhart) *v.* McKenna ..	82
R. *v.* McLean	122
R. *v.* National Arbitration Tribunal	55
R. *v.* Rouse	122
R. *v.* Tompson	86
R. *v.* Sullivan	97
R. *v.* Whitworth	97
Roberts *v.* Brennan	136
Roberts *v.* Exors. Lord Belhaven	71
Roche *v.* McDermott ..	33

S.

Salvesen *v.* Administrator of Austrian Property	138
Sandiman *v.* Breach	76
Santongeli *v.* Neilson	81
Schwann, The	17
Scott *v.* London & St. Katherine's Docks Co.	12
Secretary of State for Home Affairs *v.* O'Brien	121
Seaman *v.* Burley	97
Shingler *v.* P. Williams & Sons	73
Simonin *v.* Mallack	138
Sims *v.* James Grose, Ltd. ..	20
Sinclair *v.* Sinclair	159
Singleton *v.* Tomlinson ..	34
Siveyer *v.* Allison	141
Smith *v.* Baker	41
Smith *v.* Blandy	12
Smith *v.* Great Western Railway Co.	109
Sottomayor *v.* de Barros ..	138
Soar *v.* Foster	140
Sproule *v.* Hopkins	139
State, The (Cannon) *v.* Kavanagh	121
Stretford *v.* Mole & Lee ..	73

T.

Taylor *v.* Taylor	35
Thomas *v.* Quartermaine ..	43
Turner *v.* Thompson	136

U.

Udney *v.* Udney	138

V.

Virgil, The	10

W.

Wemyss *v.* Hopkins	89
White *v.* Redfern	86
White *v.* White	139
Williams *v.* Birmingham Battery Co.	43
Wilsons *v.* Clyde Coal Co. English	41
Wilson *v.* Carnley	166
Wilson *v.* Wilson	138
Wing *v.* London General Omnibus Co.	14
Wombell's Settlement, *Re* ..	141

CASES

DETERMINED BY

THE HIGH COURT OF JUSTICE

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL

IN

NORTHERN IRELAND

IN RE MICHAEL DAILY,

A REGISTERED OWNER OF LAND.

C.A.
1943.

April 29.
May 12.

Limitations—Husband and wife—Husband ceasing to live on lands—Wife and children in exclusive possession for statutory period—Local Registration of Title (Ireland) Act, 1891, *sec.* 52.

The owner of lands registered under the Local Registration of Title (Ireland) Act, 1891, lived on the lands with his wife and his two children until 1928, when, owing to disagreements with his wife, he left with his wife's approval and went to live elsewhere ; he never returned to the lands and he and his wife never afterwards spoke to one another. His wife and the children continued to live and work on the lands, and continuously remained, and still were, in exclusive beneficial occupation and receipt of the profits thereof without any claim being made by the registered owner, or any acknowledgment of right being given to him. The wife of the registered owner, claiming that but for the provisions of the Local Registration of Title (Ireland) Act, 1891, she would have acquired a title to the lands by possession, applied to the Court under sec. 52 of that Act for an order declaring her title to the lands and ordering the register to be amended accordingly.

Held, by the Court of Appeal, that but for the provisions of the Local Registration of Title (Ireland) Act, 1891, the right of the registered owner would have been statute-barred, and that the wife or, as the Court thought, the wife and the two children, would have acquired a title by possession to the lands.

APPEAL from an order made by the County Court Judge of Tyrone. The facts are stated in the judgment.

C.A. 1943.

IN RE MICHAEL DAILY.

ANDREWS, L.C.J.

McCoy, K.C., and *Hanna* for the registered owner.

Sheil for the applicant.

ANDREWS, L.C.J., delivered the judgment of the Court (Andrews, L.C.J., Babington and Murphy, L.JJ.), as follows :—

In this matter the registered owner, Michael Daily, appeals against the order of His Honour, Judge McGonigal, the County Court Judge of Tyrone, made on 10th February, 1943. The said order, which was made on the application of the registered owner's wife, Alice Daily, after stating that the Court was satisfied that but for the provisions of section 52 of the Local Registration of Title (Ireland) Act, 1891, the said Alice Daily would have acquired a title by possession to the lands therein referred to which are numbered 14605 in the Folio for the County of Tyrone, declared her title to the said lands accordingly, and further ordered that the said Alice Daily be registered as owner in fee simple of the said lands subject as in the said Folio set forth.

The applicant and the registered owner were married in February, 1910. The lands comprised in the Folio were purchased in or about the month of August, 1910, the transaction being completed by an Assignment to Michael Daily, dated 21st November, 1910.

The parties continued to reside together until 1928, though differences appear to have developed between them at a somewhat earlier date. As is customary in such cases each blamed the other. There is evidence that the wife accused the husband of drinking poteen, whilst the husband declares that he could not please her. In February, 1928, she became definitely so mentally affected that she was committed to a Mental Hospital where she remained for about four months. After she returned their relations apparently became more strained with the result that on 8th December of that year he left the house. Whilst he does not seem to have said goodbye, yet apparently he left with his wife's full approval ; for she stated in her evidence before the

learned County Court Judge that she said to him when they could not live agreeably, it was better to separate. He took up his residence with his brother who lived some three miles away. It is not suggested that any express arrangement was made between the parties before he left in regard to the lands. Neither of them has spoken to the other since the day that he left. The two children—the elder a boy named Patrick, then aged about 16, and the younger a girl about 14 -remained with their mother. Together they appear to have worked upon and to have improved the holding in many important respects.

In the foregoing circumstances the applicant's case was that her husband abandoned the lands, as also her and her children in 1928, and that by undisturbed and exclusive possession since that date she had acquired a title under the Statutes of Limitation. In reply to this her husband contended that he never abandoned his wife or family or the lands ; that he left stock, farming implements and furniture behind him for the benefit of his wife and family ; and that he was always ready and willing to return and give assistance had he been asked. He admitted on cross-examination that he and his son just bade each other the time of day when they met.

On the evidence and submissions before him the learned County Court Judge found, as appears by recitals in his order, that the tenant right interest in the lands was purchased in or about the year 1910, and that the lands were assigned to Michael Daily ; that the fee simple interest in the lands also became vested in him on 5th February, 1920, and that he became registered as owner in fee simple on 18th November, 1920 ; that Michael Daily abandoned Alice Daily, ceased to reside on the lands on 8th December, 1928, and had no intention of returning, leaving the said Alice Daily with their children, Patrick Daily and Cassie Daily, residing in the house ; that Michael Daily had not since returned to reside on the lands, and that Alice Daily on the departure of her husband entered into sole beneficial occupation of the lands and had continued in uninterrupted beneficial occupation and

C.A. 1943.

IN RE MICHAEL DAILY.

ANDREWS, L.C.J.

possession thereof and had been in receipt of the rents and profits thereof to the present date without having received or acknowledged any claim from Michael Daily or any other person in respect of the lands, and had thus acquired a statutory title.

The argument advanced before us on behalf of Michael Daily in answer to this claim was based mainly upon the decision of the Supreme Court of the Irish Free State in *Keelan v. Garvey* (1). That case was tried by Molony, C.J., sitting for the Master of the Rolls, and the report of the trial is to be found in [1924] 1 I.R. 107. The tenant of a farm, having quarrelled with his wife, left the farm in November, 1897, and the wife remained on in sole possession until her death in 1923. Within a few days of his leaving his home he wrote two letters to his wife, one saying that he was going abroad (which, in fact, he did not do), the other asking her to sell oats and pay some money he owed, and also giving her directions in reference to the treatment of the lands. He never returned to the farm during his wife's lifetime. After her death he claimed to be beneficially entitled to the farm which his wife had purchased under the Land Purchase Acts, and sought a declaration that his wife's executor held the farm as trustee for him. The decision of Molony, C.J., that the wife had acquired a title to the land under the Statutes of Limitation, by reason of her exclusive possession and full beneficial enjoyment, was reversed by the Supreme Court, who, relying upon a husband's obligation to maintain his wife, came to the conclusion on the facts before them that after her husband's departure the wife lived on in her husband's residence and home in enjoyment of the support and maintenance which was her right. In other words, they considered that the husband never ceased in the eyes of the law to be in the possession of the holding, and that the wife, accordingly, never entered into possession against the husband. The Statutes of Limitation, therefore, never ran in her favour.

In arriving at this conclusion the Court was influenced by certain facts which are not to be found

(1) [1925] 1 I.R.1.

in the present case. The first of these we have already referred to, namely, that by writing the letters which he did the husband treated his wife as a mere agent or bailiff for him. In the second place, the husband had become the owner of the farm subject to certain trusts in regard to the possession or user of rooms and otherwise in favour of his mother and brother, both of whom lived on with the wife maintaining themselves out of the farm as before. Thirdly, O'Connor, J., relied strongly in his judgment on the fact that the wife had become the purchaser of the farm under the Land Purchase Acts at a time when the husband could not have lost his estate because twelve years had not elapsed since he had left the farm. She therefore became the legal owner upon trust for her husband which in itself made her possession the possession of her husband. Finally, there is the finding of fact to be found in the judgment of O'Connor, J., at pp. 12 and 13, which we must assume was supported by evidence, that there was an " arrange- " ment or understanding "between the husband and wife that she was to have the use of the farm at least during separation or possibly for her life. The beneficial occupation was, as he says, in accordance with an arrangement made by the owner with the person who had become the legal owner.

These special facts appear to us wholly to differentiate the two cases ; and the decision in *Keelan v. Garvey* (1), assuming it to have been properly decided, cannot therefore be safely relied upon as a guide in the present case. Rather does it appear to us that, as pointed out by O'Connor, J., the question in such cases is one of fact to be decided on the evidence of circumstances ; and the finding of the learned County Court Judge, who had *Keelan v. Garvey's* case (1) before him, must be taken to negative the existence of any such " arrange- " ment or understanding " in the present case as was held established in *Keelan v. Garvey* (1). In our opinion the County Court Judge was fully justified in arriving at the finding which he did ; and this finding, influenced, no doubt, in a measure by the demeanour

(1) [1925] 1 I.R. 1.

C.A. 1943.

IN RE MICHAEL DAILY.

ANDREWS, L.C.J.

of the witnesses before him, should not be disturbed by us. We must hold that but for the provisions of the Local Registration of Title Act, 1891, the estate and interest of the husband in the holding would be barred.

Only one further point remains to be considered. Throughout the period that the Statute was running against the husband his two children were in occupation along with his wife. They worked on the farm and lived on its produce just as she did ; and the fact that they were not of age when their father left appears to us not to provide any sufficient reason for excluding them from a joint ownership with their mother. If she assents to this view we shall direct an amendment of the folio accordingly. If, on the other hand, she disputes her children's joint title with herself we shall require notice to be served upon the children, and the case re-entered for hearing. In the determination of this supplemental point the husband has in law no interest. Accordingly, he need not be served with notice of the hearing, nor need he appear thereon.

The appellant must pay the respondent's costs of the appeal up to and including this date.

Solicitor for the appellant : *Roderick H. O'Connor.*
Solicitors for the respondent : *Shields & Murnaghan.*

J. McC.

[NOTE.—The above suggestion of joint ownership was agreed to without further argument.—EDITOR.]

C.A.
1943.

McBRIDE v. STITT AND ANOTHER.

Oct. 10.
Nov. 4.

Negligence—Statements made by defendants the only evidence of negligence given on behalf of the plaintiff—Admissibility of whole statement—Onus of proof.

The plaintiff's daughter was killed by a lorry owned by one of the defendants and driven on the public road by the other defendant. At the trial of an action brought by the plaintiff claiming damages for the negligent driving of the lorry no eye-witness of the accident was called, and the principal evidence consisted of certain statements made by the defendants to the effect that two little boys having run from behind a motor car travelling in the opposite direction, the driver of the lorry was obliged to swerve in order to avoid hitting them, and in doing so struck the plaintiff's daughter who was cycling from a side street on to the road on which the lorry was travelling. At the close of the plaintiff's case the trial judge held that the statements were not admissions of negligence, that they pointed to inevitable accident, and that the plaintiff had not discharged the onus of proof, and gave judgment for the defendants.

Held, by the Court of Appeal, that the plaintiff had established a *prima facie* case of negligence of which no satisfactory explanation had been given by the defendants · and that the statements of the defendants whether in favour of the plaintiff or the defendants were admissible in evidence *in toto*; and that there should be a new trial of the action.

APPLICATION by the plaintiff for a new trial of the action.

The facts are stated in the judgments.

McCoy, K.C., and *Copeland* for the appellant.

Chambers, K.C., and *Phelan* for the respondents.

Cur. adv. vult.

ANDREWS, L.C.J. : In this action the plaintiff, as the administratrix of her daughter, Sarah McBride, deceased, claims damages under the provisions of the Law Reform (Miscellaneous Provisions) (Northern Ireland) Act, 1937, for loss caused by and consequent upon her death resulting, as alleged, from the negligence of the

ANDREWS, L.C.J.

C.A. 1943.

McBRIDE v. STITT AND ANOTHER.

ANDREWS, L.C.J.

defendants in the driving of a motor lorry upon 9th May, 1942. The defendant, Joseph Stitt, Senior, was the owner of the lorry, and his nephew, the defendant, Joseph Stitt, Junior, was the driver. The registrar's certificate states that at the close of the plaintiff's case the learned trial judge, Mr. Justice Brown, directed that judgment be entered for the defendants with costs. This appeal is brought for an order setting aside this judgment and directing a new trial of the action. The sole ground relied upon in support of the application is "that the learned judge was in error in holding that "there was no evidence that the injuries to plaintiff's "daughter, Sarah McBride, which resulted in her "death, was caused by the negligence of the defendants."

The plaintiff was handicapped at the trial by her inability to produce any eye-witness of the accident. Her own evidence, so far as is material for the present appeal, was that her daughter, aged 11 years and 9 months, went out on her bicycle between 1-20 and 1-30 p.m., on 9th May, 1942. Later she heard she was knocked down and killed. On the following day the defendant, Joseph Stitt, Senior, called with a son (I think this should read nephew) of his. He said he (referring to his nephew, the driver) could not save her; to avoid two children he ran into the kerb. He did not see her until she was killed. He said they swerved up the footpath. The plaintiff's sister corroborated this testimony, stating that he (referring to Joseph Stitt, Senior) said they had to go into the kerb to avoid two boys; and that they did not see the girl.

The only other material evidence was that of Constable Robert McClelland who put in two statements—one made by each of the defendants on the evening of the accident. In his statement Joseph Stitt, Senior, said he was sitting on the front seat of his lorry driven by Joseph Stitt (his co-defendant). The lorry was proceeding down the Newtownards Road, travelling about the ingoing tramlines going towards the City; and, when they approached the mouth of Susan Street, he saw two small boys cross the Newtownards Road from the rear of a motor car which was travelling in the opposite direction, and the driver swerved the lorry

to the left into the mouth of Susan Street to avoid striking the boys. At the same time when his driver swerved he saw a little girl cycling out of Susan Street into the Newtownards Road right in front of the lorry. The front of the lorry struck the girl, and the lorry crashed against the tram standard at the corner of Susan Street and Newtownards Road. The cause of the accident was, he said, that the driver had to swerve in order to avoid striking these two boys, and he had not enough space to pull up. He could not say where these boys went to. The lorry was driven at a moderate speed before the impact.

The statement of Joseph Stitt, Junior, was to the like effect. He estimated the speed of the lorry as about 15 m.p.h., and the load at two tons of coal. He said that as he approached Susan Street he saw a private motor car approaching in the opposite direction, and when it was about abreast of his lorry two small boys about seven years of age ran across the road from the footpath on his right and at the rear of the motor car. He added that he had to swerve suddenly to avoid running over them, and the front of his lorry was about the centre of Susan Street when these boys ran across the road. When he swerved his lorry he noticed a little girl on a bicycle at the corner of Susan Street next City centre. She was apparently cycling out of Susan Street into the Newtownards Road, and she was struck by the front of his lorry which came to a stop when it crashed into a tramway standard at the corner of Susan Street and Newtownards Road. He had no option, he said, but swerve to his left to avoid running over the two boys, and he could not say where they disappeared to. He concluded the material portion of his statement with the words : " When I saw " the two boys and applied my brakes (his first reference " to braking) I had not enough space to save the little " girl."

No other relevant evidence was given on the issue of negligence ; and Mr. Chambers, on behalf of the defendants, applied for a direction on the sole ground that there was *no evidence* of negligence on the part of the defendants. Having expressed the view that it

C.A. 1943.

McBRIDE v. STITT AND ANOTHER.

ANDREWS, L.C.J.

was strange that no one seemed to have seen the accident and that no witness to the accident was called to give evidence, the learned judge said, as appears in his Report, that he considered the admissions made by the defendants and came to the conclusion that they were not admissions of negligence—"they pointed to "inevitable accident." As there was no other evidence connecting the defendants with the death of the little girl he ruled that "the plaintiff had not discharged "the onus of proof, and gave judgment for the "defendants."

I regret that I am unable to agree with either of the two conclusions arrived at by the learned judge. "Inevitable accident" was defined by Dr. Lushington in the Admiralty case of *The Virgil* (1), in terms which have since received general acceptance—"that "which the party charged with the offence could not "possibly prevent by the exercise of ordinary care, "caution, and maritime skill." Omitting the word "maritime" the definition is as applicable to Courts of Common Law as to the Court of Admiralty. On the evidence this was not in my opinion a case of inevitable accident, the onus of proof of which, after the plaintiff has established a *prima facie* case of negligence, lies upon the defendant. *The Bolina* (2), and *The Marpesia* (3). The sole cause of the accident suggested by the defendants in their statements is the swerve consequent upon the little boys running across the street. Had it not been for the swerve which, as contrasted with a skid, was the deliberate act of the driver, the little girl would not have been touched by the lorry. In the words of Fry, L.J., in the case of *The Merchant Prince* (4):—"How have the defendants "shown that the result of that cause was inevitable?" Is it to be said, in the case of a broad main street such as the Newtownards Road, that, without any evidence upon oath of the driver to support it, he can excuse himself on the ground of inevitable accident from liability for killing one person who was blameless by merely stating that another person had negligently

(1) 2 W. Rob. 205.
(2) 3 Notes of Cases 210.
(3) L.R. 4 P.C. 212 at p. 219.
(4) [1892] P. 179 at p. 189.

attempted to cross his path, and so had induced him to make his fatal swerve ? Is the mere statement of a possible injury to one person to be regarded as a conclusive answer to liability for killing another ? I am not to be understood as saying that such facts, if satisfactorily established by the defendant upon oath, might not afford a complete answer to the plaintiff's *prima facie* case of negligence ; but this would be rather by negativing negligence than by affirmatively establishing inevitable accident. Whilst freedom of action on the part of the driver existed to the extent proved at the trial in this case, it seems to me that it would have been quite within the competence of judge or jury (had there been one) to hold that the killing of this little girl might " have been prevented " by the exercise of ordinary care, caution and skill."

I pass to the second ground stated by the learned judge for dismissing the accident, namely, that the plaintiff " had not discharged the onus of proof." As neither defendant gave any evidence I assume that these words mean that the plaintiff gave no such evidence of negligence as, if there had been a jury, would have entitled the learned judge to leave the case to them. Now in my opinion there can be no real doubt as to the plaintiff having given *prima facie* evidence of negligence. The young girl, riding her bicycle without negligence on her own proper side of Susan Street, is run into and killed by a motor vehicle which, unexpectedly and without any warning to her, was suddenly and deliberately deflected from its path by one of the defendants ; and this vehicle, having traversed a course where *prima facie* it had no right to be, mounted the footpath, and ultimately, in the words of both defendants, " crashed against the tram " standard." I do not think there could be a much stronger *prima facie* case of negligence. But it was sought in argument before us to answer this *prima facie* case of negligence by reference to the explanations given by the defendants in their statements. Let me say at once that I do not accept Mr. McCoy's submission on behalf of the plaintiff that, whilst accepting the admissions contained in the defendant's statements

C.A. 1943.

McBRIDE v. STITT AND ANOTHER.

ANDREWS, L.C.J.

which were put in evidence by the plaintiff, we must reject these explanations as inadmissible evidence. One's legal instincts revolt against such a principle; and my colleague, Murphy, L.J., has referred me since the hearing to the case of *Smith v. Blandy & another* (1), which may be accepted in my opinion as conclusive authority against the proposition contended for by Mr. McCoy. Best, C.J., however, makes it clear in his judgment that "what a party says in his favour in "such a statement must not be taken as true, but must "be left, under all the circumstances, for the jury to "say whether they believe it or not."

Now it must be admitted that it has been frequently recognised that facts constituting *prima facie* evidence of negligence may be so satisfactorily explained by the party charged with such negligence as to constitute a complete defence. In a passage which has since been frequently cited, Erle, C.J., said in *Scott v. London and St. Katherine Docks Co.* (2):—"There must be reason-"able evidence of negligence. But where the thing is "shown to be under the management of the defendant "or his servants, and the accident is such as in the "ordinary course of things does not happen if those "who have the management use proper care, it affords "reasonable evidence, *in the absence of explanation by* "*the defendants*, that the accident arose from want of "care." *Ellor v. Selfridge & Co.* (3), *Halliwell v. Venables* (4), and *McGowan v. Stott* reported as a footnote at 143 L.T. 217, afford further illustrations of the same principle. This Court also recognised it in *Alexander v. Anderson* (5), but in the opinion of the Court the facts did not warrant its application. There, as here, there was evidence which, as I stated at page 170, though by no means conclusive, could not be ignored—evidence which, if uncontradicted and unexplained, would have justified a jury in coming to the conclusion that one cause at least of the accident was that the defendant was cutting the corner on his wrong side of the road. Accordingly, as the plaintiff had

(1) Ryan *v.* Moody, 257, 171 E.R. 1013.
(2) 13 L.T. 148.
(3) 46 T.L.R. 236.
(4) 143 L.T. 215.
(5) [1933] N.I. 158.

established a sufficient *prima facie* case, and as no satisfactory explanation of such *prima facie* evidence was forthcoming, the Court set aside the direction given in the defendant's favour by the trial judge and directed a new trial of the action.

When, however, we speak of "*prima facie* evidence "of negligence being explained" this necessarily means satisfactorily explained. The explanation must amount to a lawful excuse for the commission of what would otherwise be a negligent act. Bearing in mind the words of Best, C.J., to which I have already referred, it seems to me as a general proposition that the Court should be very slow in accepting as a satisfactory explanation part of a statement made by a defendant in his own favour which has not been reaffirmed on oath, and upon which, accordingly, he has not been subjected to cross-examination. But apart from this general view, I am by no means satisfied with the explanation offered by the defendants in the present case. In their statements to the constable it is their case that they swerved when they saw the boys, and that at the same time they saw the little girl cycling out of Susan Street. On the other hand, it was part of the plaintiff's evidence, upon which she does not appear to have been cross-examined, that when the defendants called with her on the day following the accident the senior defendant said that he did not see the girl until she was killed; and the plaintiff's sister, who was present on the occasion, said that he stated that "they did not see the girl." Such inconsistency between the defendants' alleged statements on a vital point clearly does not provide a satisfactory explanation of the accident. Moreover, one naturally asks, if they did not see the girl when they swerved, why did they not see her? Was this not negligence in failing to keep a proper look out? This point is emphasised to me by a view of the scene of the accident which I have had since the hearing, for the corner at the junction of the two streets is an unusually open one. On the other hand, if they did see her, why did they swerve directly towards her? for this is what admittedly must have been done, as there is no

C.A. 1943.

McBRIDE v. STITT AND ANOTHER.

ANDREWS, L.C.J.

suggestion in either statement of the lorry skidding and so getting out of control. Again, I find in these statements no satisfactory explanation of the lorry knocking down the girl, mounting the footpath, and crashing against the tram standard, if, as one of the defendants states, it was proceeding at a " moderate " speed," or, as the other says, at " about 15 m.p.h."

Other matters in the statements attributed to the defendants also trouble me, but it is unnecessary for me to refer to them. It may well be that in the witness box they may be able to give such additional evidence as will satisfactorily explain away the *prima facie* evidence of negligence which, in my opinion, the plaintiff has clearly established. All that I am to be taken as saying now is that in my judgment no explanation which can be regarded as adequate and satisfactory was before the learned Trial Judge. Indeed, it does not appear from his report that the learned Judge's attention was directed to this issue. There was, in my opinion, a clear *prima facie* case established by the plaintiff which would have entitled her to have it submitted to a jury, had the trial been before judge and jury—a case which, if unanswered by the sworn testimony of the defendants, would have entitled the jury to find a verdict in her favour.

Mr. Chambers relied very strongly upon certain passages from the judgment of Fletcher Moulton, L.J., in *Wing v. London General Omnibus Co.* (1) at p. 663 ; but these passages must be read in the light of the qualifying words in the judgment of Bankes, L.J., in *McGowan v. Stott* (2) (at p. 218), and also of the report of *Liffen v. Watson* in the *Law Times* of 18th November, 1939.

For the reasons which I have given I am of opinion that there must be a new trial. I agree with the view which will be more fully expressed by Murphy, L.J., that this trial should not be confined, as Mr. McCoy suggested, to the issue of damages. The plaintiff is entitled to her costs of this appeal and also to the costs of the first trial which was rendered abortive by the action of the defendants in obtaining a direction to which, in my opinion, they were not entitled.

(1) [1909] 2 K.B. 652. (2) 143 L.T.Rep. 217.

BABINGTON, L.J. : I concur and have little to add. The statements made by the defendants were put in evidence for the plaintiff without objection either to the statements themselves—or to the manner in which they were tendered, and they contained admissions which established a *prima facie* case of negligence.

The negligence which these statements disclosed was that the driver of the lorry departed from his course on the highway, ran down Sarah McBride, who was also on the highway, at a place where she should have been safe and thereafter mounted the footpath reserved for pedestrians. These statements also contained an explanation of and excuse for these acts which, if they had been accepted by the trial Judge, might have discharged the presumption of negligence, and there being no other evidence the plaintiff's case closed with this admission of a *prima facie* negligent act by the driver coupled with his answer.

On the learned Judge's notes I find it impossible to say whether he held that there was no evidence of negligence which, if the case had been tried with a jury, could properly have been submitted to them, which is a question of law, or whether he thought that there was *prima facie* evidence of negligence but that it was satisfactorily answered, which is a question of fact.

He says : " I considered the admission made by the " defendants and came to the conclusion that they " were not admissions of negligence—they pointed to " inevitable accident." And when the statements themselves are examined I think he may have arrived at this conclusion by holding that the reason or excuse therein advanced for the *prima facie* act of negligence was satisfactory though he has not said so.

He further ruled " that the plaintiff had not dis- " charged the onus of proof " and this suggests that he may have rejected the statements as a whole on some grounds not specified or on the ground that the admission of the *prima facie* act of negligence and the excuse given were necessarily entitled to equal weight so that the excuse cancelled the admission and destroyed the evidential value of the statements.

The finding and judgment based thereon is therefore

C.A. 1943.

McBride v. Stitt and Another.

Babington, L.J.

uncertain and unsatisfactory and there must be a new trial on this ground alone.

I am further of the opinion that as there was clear *prima facie* evidence of negligence in the statements, the explanation offered required strict investigation, and the defendants should have been allowed to go into the witness box to substantiate it and be cross-examined. If the case had been tried with a jury the proper course would have been for the Judge to refuse to direct them to find for the defendants and to tell the jury they were entitled to find that the explanation was not sufficient and to have commented on the fact that the defendants were not called, but as the case was tried without a jury the trial judge should have refused to decide on the sufficiency of the explanation at the close of the plaintiff's case or to grant a non-suit, and if the defendants were not then called he should have attached great weight to their failure to substantiate the case they made to the police by going into the witness box.

Mr. McCoy for the plaintiff asked us to send the case back for a re-trial on the ground of damages only.

This Court might possibly have taken this course if the trial judge had in specific terms found that there was no evidence of negligence, but as I am not satisfied that his findings can be so interpreted the question of liability must remain open, and our order as to costs will safeguard the plaintiff in so far as the abortive trial and this appeal are due to the plaintiff's application for a direction.

Murphy, L.J.

Murphy, L.J.: I agree.

The plaintiff in this action sues as the administratrix of Sarah McBride, deceased—her daughter—for damages under the provisions of the Law Reform (Miscellaneous Provisions) Act (Northern Ireland), 1937. Sarah McBride was "run down" on the 9th May, 1942, at about 1-35 p.m., at the entrance to Susan Street (a street off the Newtownards Road) by a motor lorry loaded with two tons of coal, and was killed. The lorry was owned by Joseph Stitt, Senior, the first-named defendant (who was sitting on the

front seat at the time of the accident), and was driven by Joseph Stitt, Junior, the second-named defendant. The facts are within an extremely narrow compass, but the problem presented to us is certainly difficult, The plaintiff did not succeed in discovering any bystander who could give evidence as to the accident, and the evidence consisted, in substance, of some bald statements made by Mr. Stitt, Senior, to the plaintiff and her sister, and the statements to the police made by Mr. Stitt, Senior, and Mr. Stitt, Junior, on the 9th May, 1942, which statements were put in evidence by the plaintiff's counsel as part of his case.

At the conclusion of the plaintiff's case, Brown, J., on the application of Mr. Chambers, non-suited the plaintiff. In his report the learned judge says that he came to the conclusion that the admissions made by the defendants " were not admissions of negligence, " they pointed to inevitable accident," and, " as there " was no other evidence connecting the defendants " with the death of the little girl I ruled that the " plaintiff had not discharged the onus of proof." " Inevitable accident " had been pleaded as one of the defences to the action, and in such a case the onus is on the plaintiff to establish a *prima facie* case of negligence, and if and when this has been done the onus of proving inevitable accident then lies on the defendant (see *The Marpesia* (1).)

The definition of inevitable accident given in that case in these words: " Inevitable accident is that " which the party charged with the damage could not " possibly prevent by the exercise of ordinary care. " caution and maritime skill," was adopted by Lopes, L.J., in *The Schwan* (2), and the same learned judge says: " I know no distinction as regards inevitable " accident between cases which occur on land and " those which occur at sea." Lord Esher, in the same case at page 429, says: " In my opinion a person " relying on inevitable accident must show that some- " thing happened over which he had no control and " the effect of which could not have been avoided by " the greatest care and skill."

(1) L.R. 4 P.C. 212. (2) [1892] P. 419 at p. 434.

C.A. 1943.

McBride v. Stitt and Another.

Murphy, L.J.

Brown, J., in non-suiting the plaintiff because she had not discharged the onus of proof, must have come to the conclusion that there was no such *prima facie* evidence of negligence as would have entitled the plaintiff to have had her case submitted to a jury. I do not agree with this view. Before considering the evidence I should say that I reject the argument of Mr. McCoy that only such portions of the statements made to the police as amounted to admissions of liability, or admissions tending to establish liability, should be treated as evidence. The entire statements were put in evidence on behalf of the plaintiff and Mr. McCoy was unable to cite any case which would give the slightest support to so remarkable a proposition. Since the argument before us, I have found the case of *Smith v. Blandy and another* (1), in which the short judgment of Best, C.J., and the cases referred to in argument and in the notes, show clearly that the *whole* statements constitute evidence in the action. If some witness had been called who could have proved :— (*a*) that when she met her death Sarah McBride was cycling in daylight on the left side of Susan Street into the Newtownards Road, (*b*) that Sarah McBride was not guilty of any negligence in so cycling, (*c*) that the defendants' lorry suddenly swerved into the mouth of Susan Street having been previously proceeding city-wards along the Newtownards Road, and (*d*) that the defendants' lorry knocked down and killed Sarah McBride and " crashed against " the tram standard which is on the footpath 20 feet from Susan Street ; such evidence, in the absence of some satisfactory reason for the swerve on the part of the lorry, would constitute a strong case against the defendants, and the onus would be clearly on the defendants to establish, if possible, some defence. *All* these facts are admitted in both the statements made by the defendants to the police, but these admissions are coupled with statements which, if correct, would show that the driver of the lorry made this sudden swerve to avoid two boys who ran across the road from the pavement on his right, that it was necessary to so swerve to save these

(1) Ryan & Moody, 257 ; 171 E.R. 1013.

boys and that he was so close to Sarah McBride when he swerved that he could not avoid her. Whether or not he saw Sarah McBride before the lorry hit her appears to be the subject of contradictory statements. Such being the evidence, I think that there was clear, *prima facie*, evidence of negligence on the part of the lorry driver and that the real question for the trial judge was: "Has a sufficient and satisfactory ex- "planation been given to show that the lorry driver "could not by the exercise of care and skill have "avoided the accident?" On my reading of the notes I do not think that he considered this, but non-suited the plaintiff on the ground that an explanation which "pointed to inevitable accident" deprived the statements of all efficacy as admissions.

I am of opinion that the statements in themselves do not give such a satisfactory and sufficient explanation of the accident as would constitute an answer to the *prima facie* evidence of negligence. If the defendants had been examined, many details would have been given with much greater particularity, e.g., the speed of the lorry, the efficiency of the brakes, the time of application of the brakes, the time when the two boys were seen (i.e., whether they were seen when leaving the pavement or when emerging from behind the rear of the passing motor-car), the position of the lorry when the boys were seen, the position of the passing motor when the lorry swerved to the left, the position of the deceased girl when the lorry swerved, was the girl seen or not seen by the driver of the lorry prior to the accident; and the evidence on these and other details would have been tested by cross-examination.

To decide that this was a case of inevitable accident on these statements alone would be, in my opinion, most unsatisfactory, with the two defendants, presumably, available as witnesses, and I do not think that Brown, J., did so decide. I do not agree that the facts admitted in the statements do not amount to *prima facie* evidence of negligence because the admissions are coupled with an explanation "pointing "to inevitable accident."

C.A. 1943.

McBRIDE v. STITT AND ANOTHER.

MURPHY, L.J.

There must be, therefore, in my opinion, a new trial of this action. I do not think that, in the present case, it would be appropriate to confine such new trial to the question of damages, as was done by the English Court of Appeal in *Laurie v. Raglan Building Co., Ltd.*(1). This was not done in *Halliwell v. Venables* (2), or in *Sims v. Jas. Grose, Ltd.* (3), two recent decisions of the English Court of Appeal, and has not been done, up to the present, in our Court.

Solicitor for the plaintiff and appellant: *Henry J. Catchpole.*

Solicitors for the defendants and respondents: *N. & F. Tughan.*

M. V. P.

(1) [1942] 1 K.B. 152.
(2) 143 L.T. 215.
(3) [1940] W.N. 63: 56 L.T.R. 377.

NIXON v. CAIRNS AND ANOTHER.

K.B.D. 1943.

June 23. July 2.

Master and servant—Child permitted by servant to ride on tractor—Negligence of servant—Liability of master.

A man employed by the defendant Cairns to drive a tractor permitted the plaintiff, a boy aged ten years, to ride with him along the public road on the tractor which for passengers was an unsafe vehicle on which to ride. While the man was driving the tractor the plaintiff, owing to the driver's negligence, fell from it and was injured.

In an action against Cairns and the driver for damages for negligence in the driving of the tractor.

Held, (by Andrews, L.C.J.), that Cairns was not liable.

The facts are stated in the judgment.

Hanna, for the plaintiff.

The defendant Cairns appeared personally.

ANDREWS, L.C.J.

ANDREWS, L.C.J.: This is an action by a boy, suing by his father as next friend, for damages for negligence in the driving of a motor tractor. At the time of the accident, which occurred on 17th September, 1941, the plaintiff was only 10½ years of age. The tractor was the property of the defendant Cairns, and on the occasion of the accident it was being driven by the defendant Glover, who had been engaged a day or two previously by Cairns to assist him in the harvest. On the day in question the defendants went together to one of Cairns's fields to cut the crop with binder and tractor. The binder ceased to function; Cairns left the field to get a mechanic from Ballygowan which was 1½ miles away; but before leaving he asked Glover, after he had done certain work in adapting it for the road, to drive the tractor to his place at Ballygowan where it was to be kept for the night. Glover had left with the tractor when Cairns returned to the field. It appears that when making the journey he departed to the extent of about three-quarters of a mile from the most direct

K.B.D. 1943.

NIXON v. CAIRNS AND ANOTHER.

ANDREWS, L.C.J.

route in the hope of getting his tea which, however, was not ready. Let me say at once that this slight departure by Glover from the most direct route did not in the circumstances amount in my opinion to such an " embarking on a frolic of his own " as would in itself have exonerated Cairns from responsibility for his acts. As Glover was leaving to resume his journey he invited a young evacuee of apparently about the same age as the plaintiff, who was staying in his house, to go for a ride with him to Ballygowan. This the boy agreed to do, and he, accordingly, got on to the seat beside Glover. The plaintiff at the same time also got on to the tractor, taking the outside position on the left-hand side of the seat. Glover says he did not ask him to get on to the tractor ; but, whether he expressly invited him or not does not appear to me very material, as I am satisfied that the boy mounted the tractor to go for the ride to Ballygowan with Glover's full consent and approval.

At this stage I should explain that the tractor was in fact a converted Citroen car from which the body had been removed. It had one continuous seat without ends, and it had no doors—an unsafe vehicle for even an adult to drive in, and particularly dangerous for a young boy who had no adequate means of holding himself on.

Only about 200 yards of the journey had been covered when, as the tractor was proceeding at a speed of some 25 m.p.h. at a right hand bend, the plaintiff apparently lost his balance and was thrown out upon the road, sustaining injuries, including a broken thigh, from which he has fortunately made an excellent recovery. Contributory negligence was not alleged ; and at the hearing I assessed the damages against Glover at the sum of £114, leaving the questions of Cairns's liability for further argument. In this connection I should say that Glover, who had allowed interlocutory judgment to be marked against him was not professionally represented before me. Cairns, who had entered a defence which was delivered by Mr. Morris McKee, was also without counsel or solicitor at the hearing, owing apparently to his Insurance

Company repudiating liability to him under his policy. Accordingly, the only legal argument submitted to me was that of Mr. Hanna who appeared for the plaintiff. His argument was based on the case of *Harris v. Perry* (1), the authority of which had, he submitted, been recognised by Lord Robson in *Grand Trunk Railway v. Barnett* (2). He relied upon it as conclusively establishing Cairns's legal responsibility for the action of his servant Glover in inviting or permitting the plaintiff to become a passenger on the tractor. I do not accept it as such. It does not appear to me to be a case establishing any such general proposition as is contended for. Rather, as pointed out in at least one leading text-book, the decision rested on the special facts of the case. The defendant was contractor for making a tunnel for a tube railway and had constructed a temporary line on which ran an electric engine which drew trucks containing excavated material. It was not fitted for passengers, and the defendant had directed that no one should be allowed to ride in it but a driver and a guard. In fact, however, it had been habitually used to carry officials in the employment of the defendant and of the railway company with the knowledge and concurrence of the defendant's representative—a man called Rowell—whose duty it was to supervise generally the underground works. There was evidence (as pointed out by Collins, M.R., at p. 224) that Rowell had sanctioned the use of the engine by the superior officers of the defendant, of whom Shaw, the timekeeper, was one, and, further, that Rowell knew that those officers invited the officers of the company to travel with them on the engine. The plaintiff was inspector of works appointed by the engineer of the railway, and he accepted from the defendant's timekeeper, who was riding on the engine, an invitation to be conveyed by it to his destination. An accident, due to the negligence of the defendant's servants, happened while the plaintiff was on the engine, and he sustained injuries. The jury found that, whilst the plaintiff was on the engine for his own convenience, yet it was

(1) [1903] 2 K.B. 219. (2) [1911] A.C. 370.

K.B.D. 1943.

NIXON v. CAIRNS AND ANOTHER.

ANDREWS, L.C.J.

with the permission of the defendant's representative. In these circumstances the Court of Appeal were of opinion that the defendant must be taken, through his representative, to have constructively permitted the plaintiff to ride on the engine, or that there was at least evidence on this point upon which the jury could so find (see judgment of Collins, M.R., at p. 226-7), and that there was evidence of failure of due care on the part of the defendant's servants for which he was responsible.

In my opinion this decision rests on at least three special facts which are not common to the present case :—(1) the fact that the defendant, who was apparently a large contractor, had only visited the line himself on one or two occasions (see judgment of Collins, M.R., at p. 224) ; (2) that in these circumstances he appointed Rowell as his representative to act on his behalf—verily his *alter ego* ; and (3) that with the knowledge and express sanction of Rowell the defendant's prohibition against travelling on the engine was habitually disregarded.

These special facts perhaps justified the establishment of a liability which would not be warranted in the present case.

I referred Mr. Hanna to the case of *Houghton v. Pilkington* (1). The plaintiff in that case, at the request of a servant of the defendant, got into the defendant's cart, which was then in charge of the servant, in order to render assistance to another servant of the defendant who had been rendered unconscious by an accident. The plaintiff fell out of the cart and was injured through the negligence of the servant in charge of the cart, who negligently started the horse before the plaintiff was settled in a safe position. The County Court Judge, from whose decision an appeal was taken, awarded the plaintiff £30, basing the defendant's duty on this, that there was an obligation on the defendant's servant in a case of emergency to procure assistance on behalf of the defendant. In the course of his judgment, Bray, J. (with whom Bankes, J., agreed) said (at p. 311) :—

(1) [1912] 3 K.B. 308.

"The question is : Did any duty in law arise from these "circumstances ? One must see whether Heaps (the "servant) had any authority to invite the plaintiff "into the cart. If there was authority, how was it "obtained ? Heaps had no express authority from "the defendant, and it was not in the ordinary course "of his duty to invite people to get into the cart, and, "therefore, if he had authority at all, it must be on "the ground that the law implies such authority from "the nature of the emergency which arose." The Court decided against the view that even the emergency conferred upon the driver of the cart an authority to invite the plaintiff into the cart, or to impose any duty on the defendant towards her.

This case is obviously a stronger one than the present ; and Mr. Hanna's only answer to it is that it was wrongly decided and should not be followed, especially as *Harris v. Perry* (supra), upon which he so strongly relied, was not cited either in argument or judgment. I cannot accept this view. It is referred to as accepted authority in several of the leading text-books ; and the underlying principle upon which it was decided—that the defendant owed no duty to the plaintiff because the servant had no authority to invite her into the cart—is sound and is equally applicable to the present case.

Now in considering the question of Cairns's liability, it must be borne in mind that two acts committed by Glover were responsible for the injuries to the plaintiff. Both continued up to the moment of the accident. Without either the accident would not have occurred. The first was his inviting or permitting the plaintiff to ride on the tractor ; the second was the negligent manner in which he drove. So far as the second of these is concerned no difficulty arises, for Glover was authorised to drive the tractor on the road ; and provided it was lawful, about which I shall speak later, his employer must be held responsible for the manner in which he executed that authority. If the servant is acting within the scope of his employment it is wholly immaterial whether the master receives the benefit of the wrongful

K.B.D. 1943.

NIXON v. CAIRNS AND ANOTHER.

ANDREWS, L.C.J.

act. The liability arises from or depends upon the servant's failure to discharge in a proper manner the duties entrusted to him, and which he was employed to perform. But the act or acts which caused the injury complained of must be shown to fall within the scope of the servant's authority, or at least it must be incidental to his employment. It is when this test is applied to the first of the two acts of Glover which caused the plaintiff's injuries that I hold the plaintiff's case must fail for he had no authority, express or implied, to invite or permit the plaintiff to take a seat in the tractor. Neither was his doing so reasonably necessary for the due discharge of his duties ; nor was such an act on his part incidental to his employment. It was an act committed by him wholly outside the scope of his employment, one which was unconnected with and in no sense incident to his service.

One further difficulty appears to me to lie in the plaintiff's way on the special facts of the case. The vehicle, as I have stated, was a converted tractor. It was only usable, and, presumably, was only licensed as such. Cairns would have had no right himself to use the tractor as if it were still a private motor car for the conveyance of passengers ; and I cannot imply the grant of an authority by him to his servant to do that which he could not legally do himself. In truth, I regard this tractor, upon which there was neither a legal right to convey passengers nor any proper security for their safe conveyance, much in the same way as I would regard the more familiar wheel-barrow. If Cairns had instructed Glover to take such an article to Ballygowan for necessary repairs, and Glover, unknown to Cairns and entirely on his own responsibility, had invited or permitted the plaintiff to ride in it, and in these circumstances an accident had occurred to the plaintiff due to Glover's negligence, could anyone seriously suggest that Cairns should be held liable ? To my mind this question really provides an argument in the nature of a *reductio ad absurdum* against the contention advanced on behalf of the plaintiff in the present case.

For these reasons I dismiss the action as against the defendant Cairns, but of course in the circumstances without costs.

Solicitors for the plaintiff: *N. & F. Tughan.*

M. V. P.

Ch.D.
1943.

Nov. 30.
Dec. 6.

In re GALWAY.

GALWAY v. INCORPORATED CRIPPLES' INSTITUTES, PEOPLE'S PALACE AND HOMES OF REST.

Will—Construction—"All my interest in the fruits and benefits "contained in my ground rents"—"British Government "Securities"—Moneys deposited in Trustee Savings Bank—Gift to charity subject to condition that they will keep grave in order—Conditional gift or trust for perpetual maintenance—Direction to sell real estate—Proceeds of sale not disposed of—Real or personal estate.

A testator directed his executors and trustees to sell his house property and place the purchase money in the bank upon deposit, but did not indicate the object of the conversion. He left and bequeathed to a certain charity, in the will called "the Cripples' "Homes," all his interests in the fruits and benefits contained in his ground rents and British Government Securities provided it should be accepted subject to the condition that they should keep his grave and tombstone in order to the satisfaction of his trustees and next-of-kin, and future representatives. The house property was freehold. Part of the assets consisted of money deposited in a Trustee Savings Bank.

Held, (by Murphy, L.J.):—

1. That the testator's entire interest in the ground rents passed under the gift to the charity.
2. That the money on deposit in the Trustee Savings Bank did not pass under the gift of "British Govern- "ment Securities."
3. That the gift to the charity was a valid charitable gift on a condition which was not legally enforceable.
4. That the heir-at-law was entitled to the proceeds of the sale of the house property.

Hugh Galway by his will, dated 6th September, 1938, appointed the plaintiffs his executors and trustees, and after directing them to pay his debts and funeral and testamentary expenses and bequeathing certain legacies, proceeded as follows:— "and now I direct that my Trustees sell my house "property and place the money in the bank upon "deposit, all my mortgagees having been noticed and "given time to have same handed in to my solicitor, "shall have all matters and things in connection with

" my estate legally and duly executed, my moneys all " being now in the bank upon deposit and that within " two years from my decease. I now leave and " bequeath to the Institute Public Palace Homes of " Rest and Tudor Lodge, Belfast and Bangor, called " the Cripples' Homes, for their sole and absolute " benefit, provided it be accepted subject to the " following conditions hereinafter mentioned: that " they keep my grave, tombstone and its appur- " tenances tidy and clean, cleaning and lettering " tombstone and plinth say every five years to the " satisfaction of my trustees and next-of-kin and future " representatives. Secretary to send the account once " every year to my next-of-kin. All my interest in " the fruits and benefits contained in my ground rents " and British Government Securities, Secretary of " the above-named institution to give notice to the " agent or agents every six months as the moneys " accrue and become due to be used absolutely for " the sole benefit of the above-named institution, said " indowment to be called the Galway Endowment to " the Cripples' Homes, Belfast and Bangor."

The testator died on 13th September, 1942. Probate of the will was granted to the plaintiffs who took out an originating summons raising, *inter alia*, the following questions :—

2. Whether anything passes under the legacy to the Cripples' Home other than the deceased's ground rents ?

2A. Whether the gift of " all my interest in the fruits " and benefits contained in my ground rents " carries the whole of the testator's interest in his ground rents, and if not, what interest therein is the subject matter of the gift ?

3. Whether the condition regarding the keeping of deceased's grave and tombstone tidy and clean is binding on the legatee ?

4. Whether the direction contained in the said will to sell the house property effected a conversion of such of deceased's house property as was freehold estate as to pass the same to the next-of-kin and not to the heir-at-law ?

Ch. D. 1943.

IN RE GALWAY. GALWAY v. INCORPORATED CRIPPLES' INSTITUTES, PEOPLE'S PALACE AND HOMES OF REST.

Chambers, K.C., and *Patton* for the plaintiffs.

Warnock, K.C., and *M. W. Gibson* for the Incorporated Cripples' Institutes, Peoples' Palace and Homes of Rest.

Ellison, K.C., for James H. Galway and the other next-of-kin of Testator.

Curran, K.C., for David Galway, testator's heir-at-law.

The arguments of counsel appear in the judgment.

Cur. adv. vult.

MURPHY, L.J.

MURPHY, L.J.: This is an Originating Summons which has been taken out for the determination of questions arising on the construction of the will of Hugh Galway, deceased. The will is an extremely ill-drawn document, bearing on its face clear evidence that it was not prepared by any legal adviser. It is alleged that an English Chancery Judge once expressed a sense of apprehension at the thought that in the next world a judge might meet many testators who would feel indignant over his mis-construction of their wills, but I feel that if Hugh Galway had listened to the able arguments of the five learned counsel who have addressed me, he would be satisfied that the wording of his will was admirably calculated to wrap up its provisions in obscurity.

Question (2A) was submitted to me by way of amendment of the summons, as arguments were addressed to me by Mr. Ellison and Mr. Curran on behalf of their clients on the legal effect of the remarkable phrase: "All my interest in the fruits and "benefits contained in my ground rents." The testator according to the affidavit of Mr. Samuel Galway was the owner of "certain ground rents" and the question is what interest (if any) in these ground rents passed to the charity by these words. Counsel have been unable to refer me to any reported case which would assist in the construction of the

words, and, although I have referred to some cases in which the words "fruits" and "benefits"—in contexts which bear no resemblance to the present—have formed the subject of decision, I agree with counsel that there appears to be no relevant authority.

"Interest" has been already used in the will in connection with the legacies to Marion and Edna Galway, where it is directed that until the legatees attain 23 the amounts of the legacies are to be deposited in the Savings Bank and "the *interest* to be added to "their account every year"—this is clearly not the sense in which interest is used in the clause on which the question arises. "Benefit" also occurs in the will, but only in the phrase "for their sole and absolute "benefit." It has been argued that the direction: "Secretary of the above-named Institution to give "notice to the Agent or Agents every six months as "the moneys accrue." shows that the testator did not intend to make an absolute gift of these ground rents to the Charity, but I think that the subsequent words "to be used absolutely for the sole benefit of the "above-named Institution said *i*ndowment (*sic*) to "be called the Galway Endowment to the Cripples' "Homes, Belfast and Bangor." strongly suggest that by the use of these strange words "the fruits and "benefits contained in" the testator did intend to make an absolute gift of his entire "interest" in his ground rents, and accordingly I shall answer Question 2A: "The whole of the testator's interest in his ground "rents."

Another difficulty arises in connection with the words "British Government securities." In the affidavit of Samuel Galway it is stated that the testator had not at any time between the dates of his will and of his death *any* British Government securities registered in his name. Mr. Warnock on behalf of the Charity argues that these words "capture the moneys "deposited by the testator in the Belfast Savings "Bank," basing this argument on the statement on the first page of the testator's "Deposit Book" that "the Trustees are required by law to lay out all monies "deposited in '*Government Securities*'." He also relies

Ch.D. 1943.

IN RE GALWAY. GALWAY v. INCORPORATED CRIPPLES' INSTITUTES, PEOPLE'S PALACE AND HOMES OF REST.

MURPHY, L.J.

on the fact that there is no residuary clause in the will and that Hugh Galway did not intend to die intestate. To this latter argument it may be objected that *qua* his house property, mortgages and shares it must be admitted that, save in so far as the proceeds of sale are required for the purpose of paying legacies and testamentary expenses, the testator *did* die intestate. None of the cases in which the words "Government "Securities" have been defined appears to throw any light on the words as used in the present will—in some of these cases these words were held not to include Exchequer Bills, e.g., *Ex parte Chaplin* (1), 397 Alderson, B.—and as the testator was not the owner of any "Government Securities" within the ordinary meaning of these words I have to consider if these words ought to be applied to his Savings Bank deposits. The provisions as to the investment of "the several sums of money belonging to any savings "bank" are contained in Sections 15 and 19 of the Trustee Savings Bank Act, 1863, while the provisions as to "Special Investments" are now contained in Section 6 of the Savings Banks Act, 1909. Section 1 (1) of the Savings Banks Act, 1891, provides that "a "Trustee Savings bank may not be designated or "described in any manner which imports that the "Government is responsible or liable to depositors "for money placed in the safe-keeping of the bank," but among the many safeguards provided for depositors the most striking is this statutory requirement as to the investment of the Savings Bank's funds. This provision does not apply to moneys deposited through the Special Investment Department of the Bank, and in accordance with Section 6 (4) of the Savings Banks Act, 1904, there is printed in the testator's "Special "Investment" Pass Book a notice stating that the security of any special investment is not in any way guaranteed by the Government. At the date of his will the testator had money, both in his Ordinary Deposit Account with the Belfast Savings Bank, and in his Special Investment account, and before his death the amounts to his credit on both accounts had

(1) 3 Y. & C. 397.

been substantially increased. As against Mr. Warnock's contention, it is pointed out that in the earlier part of his will the testator has used the words "deposited "in the Savings Bank," "money in the Bank upon "deposit," "all being now in the Bank upon deposit," and although the testator, with the ingenuity which he has displayed in selecting inappropriate words, may conceivably have intended to describe moneys on deposit in the Savings Bank as "British Govern- "ment Securities," I consider that conjecture only could lead me to hold that this was the expressed intention of the testator. Having already used words which aptly describe the moneys on deposit, I can see no sufficient reason for the change of description to "British Government Securities," words which, by a very strained construction, might be applied to the moneys on the "ordinary" deposit account in the Savings Bank (the testator being assumed to regard the moneys so deposited as transmuted into the Government Securities in which moneys in the hands of the Bank's Trustees had to be invested), but which could not be applied to the "Special Investment" deposits by any such process of reasoning. Accordingly, I answer Question 2: No.

On the third question I have also had the advantage of learned and interesting arguments. Mr. Warnock argued that the words as to the "grave, tombstone "and its appurtenances," etc., merely created "an "honourable obligation" on his clients, the Charity, which was not legally enforceable but which his clients would voluntarily carry out. This view of the effect of the words is supported by the decision of Sir Andrew Porter, M.R., in *Roche v. McDermott* (1), a case which was mentioned by Mr. Chambers in opening the Summons.

As against this Mr. Ellison and Mr. Curran argue that this is a gift on trust, to perform the trust of maintaining the tomb in perpetuity, and as the tomb does not form part of a church the gift is void; alternatively, that the gift is subject to a condition precedent which cannot be carried out and that the

1 [1901] 1 I.R. 394.

Ch.D. 1943.

IN RE GALWAY. GALWAY v. INCORPORATED CRIPPLES' INSTITUTES, PEOPLE'S PALACE AND HOMES OF REST.

MURPHY, L.J.

gift accordingly fails, or that having regard to the words "to the satisfaction of my trustees and next-of-"kin and future representatives Secretary to send the "account once every year to my next-of-kin," the gift fails for uncertainty. Mr. Curran points out that *in Roche v. McDermott* (1), an undertaking in writing (as to the painting of the railing and ironwork of two vaults) was to be given once and for all, whereas in the present case it was required that work should be done on the grave in perpetuity. I have carefully considered the arguments and the cases referred to, including *In re Barker, decd.* (2), and have come to the conclusion that, sitting as a Judge of first instance, I ought to follow the decision of that eminent judge, Sir Andrew Porter. I do not think that on principle that case can be distinguished from the present, and in answer to Question 3 I shall declare that there is a valid charitable gift to the Incorporated Cripples' Institutes, People's Palace and Homes of Rest and that the subsequent words do not constitute a legally enforceable condition.

The fourth question led to another interesting argument, this time between Mr. Ellison on behalf of the next-of-kin and Mr. Curran on behalf of the heir-at-law. Mr. Ellison argued that the will effected a conversion of the real estate for all purposes, and that the undisposed of proceeds of the sale of real estate would therefore pass to the next-of-kin and not to the heir-at-law. Of the reported cases on the subject Mr. Ellison selected *Singleton v. Tomlinson* (3), as his "sheet anchor," while Mr. Curran's choice fell on *Fitch v. Weber* (4). The leading case of *Ackroyd v. Smithson* (5), is famed for the argument of Lord Eldon (then Mr. Scott) rather than for the short judgment of Lord Thurlow, L.C.—see Sargant, J., in *In re Hopkinson* (6): "I think that for practical purposes "one may take the celebrated argument of Sir John "Scott, afterwards Lord Eldon, as containing the true

(1) [1901] 1 I.R. 394.
(2) 25 T.L.R. 753.
(3) 3 A.C. 404.
(4) 6 Hare 145, 67 E.R. 1117.
(5) 1 Bro. C. C. 503, 28 E.R.43 1262.
(6) [1922] 1 Ch. 70.

"view of the law." One of the propositions in this argument is: "It is admitted and cannot be denied "that when a testator directed real estate to be sold "for special purposes if any of these purposes become "incapable of taking effect the heir-at-law shall take, "because there is an end of the disposition when there "is an end of the purposes for which it was made." *Taylor v. Taylor* (1) establishes that if a testator directs a sale of his real and personal estate and the proceeds to form a mixed fund, the heir-at-law, in the event of a gift of any portion of the mixed fund not taking effect, will be entitled to so much as was the proceeds of the real estate, upon the principle that the heir-at-law cannot be disinherited unless the property was given away from him, and that the Court when it has no directions from a testator to whom money arising from the sale of part of his real estate shall go, will give it to his heir-at-law. It also appears from the authorities that an express direction that the proceeds of the sale of real estate shall be deemed personalty, even though this is followed by an express declaration that the heir-at-law shall not take in the case of lapse, will not prevent the operation of this rule in favour of the heir-at-law. *Singleton v. Tomlinson* (2) does not throw any doubt on these, accepted, principles; the decision of the House of Lords in that case was expressly based on the special words of the will and the effect of the residuary clause which, in the opinion of their Lordships, was clearly so worded as to capture the proceeds of the sale of the real estate. In the present case there is no residuary clause. There is no direction from the testator to whom the proceeds of the sale of the real estate should go, there is nothing which would indicate that the real estate should be converted for all purposes, and I hold, without hesitation, that the undisposed of proceeds of the sale of real estate go to the heir-at-law of the testator. The answer to Question 4 is therefore: No.

All the parties are entitled to their costs, the plaintiffs' costs to be taxed as Executors' costs. On

(1) 3 De G.M. & G. 190. E.R. 76.

(2) 3 A.C. 404.

Ch.D. 1943.

IN RE GALWAY. GALWAY v. INCORPORATED CRIPPLES' INSTITUTES, PEOPLE'S PALACE AND HOMES OF REST.

MURPHY, L.J.

the application of Mr. Chambers, Counsel for the plaintiffs, in which all the other parties concurred, I adjourned the summons into Court, having regard to the difficulty of the questions argued and the value of the estate. I appoint James Henry Galway to represent all the testator's next-of-kin other than David Galway.

Solicitors for the plaintiffs: *Galway & Hawthorne.*
Solicitors for the Incorporated Cripples' Institutes, &c.: *Cleaver, Fulton & Rankin.*
Solicitor for David Galway: *T. Hewitt.*
Solicitors for James H. Galway: *Norman Wilson & Co.*

M. V. P.

McILHAGGER v. BELFAST CORPORATION.

K.B.D. 1943.

Nov. 2. Dec. 10.

Negligence—Employer and Workman—"Factory"—Factories Act (Northern Ireland), 1938 (2 Geo. 6, c. 23) sec. 157—Dangerous employment—Duty of employer to provide for safety of workman—Maxim "Volenti non fit injuria."

A workman was employed by the defendants at a pumping station in connection with their sewerage system. At the pumping station sewage was discharged into tanks in which the solid matter sank to the bottom; the liquid was pumped off, and then the solid matter was pumped into barges from which it was discharged into the sea. On 16th December, 1942, the workman started work at six a.m.; a gale was then blowing and it was raining heavily. His first duty was to inspect certain tanks containing sewage; while doing so he was drowned in one of the tanks. The route to the tanks was along a path on both sides of which as far as the tanks there was a fence three feet high, but along the side of the tank in which the man was drowned there was no fence; the wall of the tank was level with, or about one inch above the level of, the path; it contained about six feet of sewage.

In an action brought by the workman's widow and administratrix for damages for negligence and for breach of statutory duty under the Factories Act (Northern Ireland), 1938, sec. 27,

Held (by Brown, J.):—

1. That the pumping station was not a "factory" within the meaning of the Factories Act (Northern Ireland), 1938.

2. That the work was of a dangerous character and that the defendants did not use all reasonable precautions for the protection of the workman.

3. That the maxim "*Volenti non fit injuria*" did not apply.

4. That the plaintiff was entitled to recover damages.

ACTION brought by Eleanor McIlhagger, widow and administratrix of William McIlhagger, for damages for negligence and breach of statutory duty causing his death.

The facts are stated in the judgments.

Fox, K.C., and *Nicholson* for the plaintiff.

Warnock, K.C., and *Copeland* for the defendants.

BROWN, J. BROWN, J.: The plaintiff is the administratrix of her husband, William Boyd McIlhagger, who met his

K.B.D. 1943.

McIlhagger v. Belfast Corporation

Brown, J.

death on 16th December, 1942, when employed by the defendants as a pump-man at No. 2 Pumping Station, Northern Road, Belfast.

The action is brought under the Fatal Accidents Act, 1846, and under the Law Reform (Miscellaneous Provisions) Act Northern Ireland, 1937. It was agreed during the hearing that if I found for the plaintiff I should assess damages under the Fatal Accidents Act only and any claim under the Law Reform (Miscellaneous Provisions) Act was by consent withdrawn. At the hearing Mr. Fox asked leave to amend the Statement of Claim by adding a claim for breach of statutory duty claiming that the pumping station was a factory within the meaning of section 157 of The Factories Act, 1938, and that there was a breach of the duty under section 27 of the said Act to provide and maintain so far as is reasonably practicable a safe means of access to work. Mr. Warnock by leave pleaded a simple traverse of this additional claim.

Deceased had been employed for many years at the defendants' pumping station in connection with the local sewerage system. From the evidence of Mark Partington, an engine-man, it appeared that deceased started work at 6 o'clock a.m. His duty was to see that the settling tanks were prepared for the day men and that the top water was off; he had to get the top water off the tanks having first inspected them; he would open the suction valve at the tank and would inform the fireman to prepare the boiler to pump the water off—all according to the state of the tide. Deceased's route was along the path shewn on the map turning left when he arrived at the tanks, then along the cinder path which runs alongside the tanks to open the sludge valve and then along the side of the open channel between the two rows of settling tanks to the middle of the second tank where there was another valve. Each tank was 120 feet long by 40 feet wide. The day men go into the tanks and push the sludge down to the pump-hole. They start work at 8-45.

Partington says that on the morning of 16th December he was in the engine house. He heard

deceased coming in and asking about the West Pond. It was a very bad morning—a heavy gale and plenty of rain. High water was at 7 a.m. It was the duty of deceased to take the height of the tide and report to Partington from the screening-house.

At 7-5 a.m., Patterson, the fireman, and Partington went to look for deceased. They went over to the tanks and discovered his torch on the cinder path at the point marked on the map. The body of McIlhagger was discovered in the tank almost opposite to the place where his torch was discovered. There were about six feet of sewage in the tank. Partington said the deceased would kneel over and shine his torch to the tank to see its state.

Formerly the direct path to the tanks had been diagonally across a piece of ground on which a barrage balloon had been put. The path was then changed to the route already described. Before 1939 these tanks had been lighted by a lamp at the north-east corner of the tanks, and the deceased when going his rounds carried a big flare known as a duck lamp supplied by the defendants. Since 1939 there has been no lighting of the tanks and deceased was supplied with a hand torch which gave much less light. Guard rails had been put up at the corners of the open channels. Along the path down the open channel between the two rows of tanks was a timber guard fence along both sides three feet high. There was no guard along the side of the settling tank and the wall of the tank was level with, or about one inch above, the level of the cinder path. No evidence was called as to the cause of death but as evidence was given that the deceased was a strong healthy man I inferred he died from drowning.

Mr. Fox's contention was that after "the black-out" there should have been some rail or guard between the cinder path and the tank and that the defendants in not erecting some such guard were wanting in their common law duty to the plaintiff, and that such failure was a breach of their statutory duty under ection 27 of the Factories Act, 1938.

K.B.D. 1943.

McILHAGGER v. BELFAST CORPORATION.

BROWN, J.

Section 157 of the Act of 1938 defines a factory. The operative part of the section reads :—

"Subject to the provisions of this section the "expression 'factory' means any premises in "which or within the close or curtilage or precincts "of which persons are employed in manual labour "in any process for or incidental to any of the "following purposes namely :—

"(a) the making of any article or a part of any "article or,

"(*b*) the altering, repairing, ornamenting, finish- "ing, cleaning or washing, or the breaking "up or demolition of any article or,

"(*c*) the adapting for sale of any article ;

"being premises in which or within the close or "curtilage or precincts of which the work is carried "on by way of trade or for purposes of gain and to "or over which the employer of the persons em- "ployed therein has the right of access or control."

The section goes on to set out fourteen different kinds of premises which, whether or not they are factories by reason of the definition, are to be included. There is no direct reference anywhere to a pumping station. Sub-section 7 says that premises shall not be excluded from the definition of a factory by reason only that they are open-air premises, and sub-section 9 says that any premises belonging to any municipal authority shall not be deemed not to be a factory by reason only that the work carried on thereat is not carried on by way of trade or for purposes of gain.

The part of the section relied on by the plaintiff is (*b*) of sub-section 1 : "The altering, repairing, "ornamenting, finishing, cleaning or washing or the "breaking up or demolition of any article." Does the work carried on at the pumping station come within this clause (*b*) ?

The sewage flows in from the main sewers through a screen or riddle where solids are removed, along through a main sewer or open channel into the settling tanks where the solids settle or sink to the bottom ; the liquid is pumped off into the ponds from which it flows into the harbour at certain states of the tide.

The solids are pumped into barges or steamers and are taken out to sea to be discharged there.

The part of clause (*b*) relied on is "altering" or "the breaking up or demolition." I have come to the conclusion that neither covers what takes place at the pumping station. This is a place for the collection and disposal of sewage. The article comes in as sewage and it goes out as sewage. It is not altered—it is sorted into liquids and solids for the more easy disposal of it. It is not broken up or demolished within the meaning of the words of the section.

In the Scottish case to which I was referred—*Henderson v. Glasgow Corporation* (1)—street sweepings and the contents of ashbins were collected and treated so as to make a fertiliser which was put on the market. That was a very different process from what goes on at this pumping station, and I have come to the conclusion that this station is not a factory within even the wide definition given in the Act.

Apart from the statutory duty, I have now to consider the claim under common law. What duty was owing by the defendants to the deceased? I quote from the judgment of Lord Watson in *Smith v. Baker & Sons* (2), at p. 353: "It does not appear to "me to admit of dispute that at common law a "master who employs a servant in work of a dangerous "character is bound to take all reasonable precautions "for the workman's safety." This statement was quoted with approval by Lord Wright in *Wilsons & Clyde Coal Co. v. English* (3), p. 81, and in Lord Wright's own words "there is a duty to exercise all reasonable "care," and at p. 84: "I think the whole course of "authority consistently recognises a duty which rests "on the employer and which is personal to the em-"ployer to take reasonable care for the safety of his "workmen." In *Naismith v. London Film Productions Ltd.* (4), Goddard, L.J., says at p. 798: "The "defendants' duty was also to make the place of "employment and the plant and material used as

(1) 2 F. [1899] 1127.
(2) [1891] A.C. 325, 353.
(3) [1938] A.C. 57, 81.
(4) [1939] 1 A.E.R. 794, 798.

K.B.D. 1943.

McILHAGGER v. BELFAST CORPORATION.

BROWN, J.

"safe as the exercise of reasonable skill and care "would permit."

Had the defendants in this case made the place of employment as safe as the exercise of reasonable skill and care would permit? It was the duty of the deceased to go to his work long before day-light in the winter-time. Pre-war the place was lighted and the deceased carried a big flare-lamp. Since 1939 the light had been removed, there was no light at the tanks, deceased could no longer carry a flare lamp, and for light he had to depend upon the uncertain gleam of a hand torch. With this uncertain light he had to travel along at least 120 feet of a tank containing about six feet of sewage matter. It is true the cinder path was ten feet wide, but if his light failed at all one knows how easy it is to wander off an avenue in the dark, and there was no protection for him at the side of the tank. A railing such as was erected on each side of the central channel would have been ample protection to him and in not erecting such I am satisfied the defendants failed in their duty to him.

There is no direct evidence as to how the deceased got into the tank, but from all the evidence—the gale blowing from the north-east, the fact that the balloon was grounded, and that the wind swirled round the end of it—I am driven to the conclusion that the deceased was blown into the tank by the force of the gale—a fate from which he would have been saved had the defendants taken the reasonable precaution of erecting a fence along the side of the tank.

If this place is a factory, then the defendants were guilty of a breach of their statutory duty under section 27 of the Factories Act of 1938.

There still remains the defence relied on by the defendants that the maxim "*Volenti non fit injuria*" applies to the case. It is true that deceased had worked under the existing conditions for about three years. There was no evidence that he had ever complained, and although no evidence was called by the defendants they relied on these matters as shewing that deceased was both "sciens" and "volens."

This defence was discussed at great length by the

House of Lords in *Smith v. Baker & Sons* (1), which I shall deal with presently. Romer, L.J., in *Williams v. Birmingham Battery & Metal Co.* (2), following *Smith & Baker* (1), says : " If the employment is of a " dangerous nature," (and in this present case I hold it was such employment) " a duty lies on the employer " to use all reasonable precautions for the protection " of the servant. If by reason of a breach of that " duty a servant suffers injury, the employer is *prima* " *facie* liable ; and it is no sufficient answer to the " *prima facie* liability for the employer to show merely " that the servant was aware of the risk and of the " non-existence of the precautions which should have " been taken by the employer, and which, if taken " would or might have prevented the injury. Whether " the servant has taken that upon himself is a question " of fact to be decided on the circumstances of each " case. In considering such a question the circum- " stances that the servant has entered into or continued " in his employment with knowledge of the risk and " of the absence of precautions is important, but not " necessarily conclusive against him." This adopts the famous judgment of Bowen, L.J., in *Thomas v. Quartermaine* (3) : " The maxim, be it observed, is " ' not *scienti* non fit injuria but ' *volenti.*' Knowledge " is not a conclusive defence in itself. But when it is " a knowledge under ' circumstances that leave no " ' inference open but one, viz., that the risk has been " ' voluntarily encountered,' the defence seems to me " ' complete,' " adopted and approved by Lord Shaw in *Letang v. Ottawa Ry. Co.* (4), at page 730. What he meant by that is explained by the Lord Justice later in his judgment at p. 699 : " Knowledge, as we " have seen, is not conclusive where it is consistent " with the facts that, from its imperfect character or " otherwise, *the entire risk*, though in one sense known, " was not voluntarily encountered, but here, on the " plain facts of the case knowledge on the plaintiff's " part can mean only one thing. For many months " the plaintiff, a man of full intelligence, had seen this

(1) [1891] A.C. 325.
(2) [1899] 2 Q.B. 338, 345.
(3) 18 Q.B.D. 685, 696, 697.
(4) [1926] A.C. 725, 730.

K.B.D. 1943.

McILHAGGER v. BELFAST CORPORATION

BROWN, J.

"vat—known all about it—appreciated its danger—"elected to continue working near it. It seems to me "that legal language has no meaning unless it were "held that knowledge such as this amounts to a "voluntary encountering of the risk."

In *Membery v. The G. W. Ry. Co.* (1), Lord Halsbury says at p. 186: "The man obviously encountered a "known risk which he had encountered for a period "of seven years, and therefore he is not entitled to "recover, upon the ground that he was voluntarily "incurring the risk—he knew that the risk existed: "and further he was himself doing the very thing "which caused danger and ultimately injury to "himself."

This last sentence must be borne in mind when considering the case of *Smith v. Baker & Co.* (2), in which the facts were very different from those in the present case. At page 338 Lord Halsbury says; "So far from consenting, the plaintiff did not even "know of the particular operation that was being "performed over his head until the injury happened "to him, and consent, therefore, was out of the "question. I do not deny that a particular consent "may be inferred from a general course of conduct. "Every sailor who mounts the rigging of a ship knows "and appreciates the risk he is encountering. The "act is his own and he cannot be said not to consent "to the thing which he himself is doing. And ex-"amples might be indefinitely multiplied where the "essential cause of the risk is the act of the complaining "plaintiff himself, and where therefore the application "of the maxim '*Volenti non fit injuria*' is completely "justified."

In the same case Lord Watson says, p. 357: "The "risk may arise from a defect in a machine which the "servant has engaged to work of such a nature that "his personal danger and consequent injury must be "produced by his own act. If he clearly foresaw "the likelihood of such a result and, notwithstanding, "continued to work, I think that, according to the "authorities, he ought to be regarded as volens.

(1) 14 A.C. 179. (2) [1891] A.C. 325.

"The case may be very different when there is no "inherent peril in the work performed by the servant "and the risk to which he is exposed arises from a "defect in the machinery used in another department "over which he has no control. The present case "belongs to that category. There was no intrinsic "danger in the operation of drilling in which the "plaintiff was engaged; the peril from which he "suffered was not evoked by his act, but was brought "into contact with him by workmen employed in a "different operation."

Lord Herschell, at p. 362, says: "Whatever the "dangers of the employment which the employed "undertakes, amongst them is certainly not to be "numbered the risk of the employer's negligence, "and the creation or enhancement of danger thereby "engendered. If, then, the employer thus fails in "his duty towards the employed, I do not think that "because he does not *straightway* refuse to continue "his service, it is true to say that he is willing that "his employer should thus act towards him."

In considering *Thomas v. Quartermaine* (1), Lord Herschell says, at p. 367: "If the effect of the judgment "be that the mere fact that the plaintiff after he "knew the condition of the premises continued to "work and did not quit his employment, afforded his "employer an answer to the action even though a "breach of duty on his part was made out, I am "unable for the reasons I have given to concur in "the decision."

I think the law is clearly defined by Lord Watson, at p. 355. "The maxim '*Volenti non fit injuria*,' "originally borrowed from the civil law, has lost "much of its literal significance. In its application "to questions between the employer and the employed "the maxim as now used generally imports that the "workman had either expressly or by implication "agreed to take upon himself the risks attendant upon "the particular work which he was engaged to perform, "and from which he suffered injury. The question "which has most frequently to be considered is not

(1) 18 Q.B.D. 685.

K.B.D. 1943.

McILHAGGER v. BELFAST CORPORATION.

BROWN, J.

"whether he voluntarily and rashly exposed himself "to injury, but whether he agreed that, if injury "should befall him, the risk was to be his and not his "master's. When, as is commonly the case, his "acceptance or non-acceptance of the risk is left to "implication, the workman cannot reasonably be "held to have undertaken it unless he knew of its "existence, and appreciated or had the means of "appreciating its danger. But assuming that he did "so, I am unable to accede to the suggestion that the "mere fact of his continuing at his work, with such "knowledge and appreciation, will in every case "necessarily imply his acceptance. Whether it will "have that effect or not depends, in my opinion, to a "considerable extent upon the nature of the risk, "and the workman's connection with it, as well as "upon other considerations which must vary according "to the circumstances of each case."

That being an accurate statement of the law as I believe it to be, I have to consider its application to this case.

This is a matter of defence and the onus is on the defendants. They have called no evidence. They rely on the evidence given for the plaintiff. As the workman met his death the defendants are not able to rely upon any cross-examination of him as to his previous knowledge of or experience of the risk which proved fatal to him. In this case "the entire risk," to use the words of Lord Justice Bowen, included a heavy north-east gale swirling round the balloon which was grounded on that morning. Have the defendants proved, in the words of Lord Watson, that the deceased knew of this risk and appreciated or had the means of appreciating its danger? I do not think they have. There is no evidence that at any previous time in his employment since 1939 the deceased knew of or had experienced such a combination of circumstances as affected him on the morning he met his death. I find that the defendants have failed in this defence. I further find that the deceased was not guilty of any contributory negligence. Consequently I think the plaintiff is entitled

to judgment, and I measure the damages under the Fatal Accidents Act 1846 at £600.

Solicitors for the plaintiff: *N. & F. Tughan.*
Solicitor for the defendants: *The Town Solicitor.*

J. McC.

K.B.D.
1944.

Feb. 10.
Mar. 3.

R. (HENDRON) v. NORTHERN IRELAND ROAD TRANSPORT BOARD.

Road and Railway Transport Act (Northern Ireland), 1935 (25 & 26 *Geo.* 5, *c.* 15), *sec.* 29, *sub-s.* 2—*Question in respect of rates of pay of employees—Refusal of Board to negotiate with trade union of which the employees were members—Conditions of Employment and National Abritration Order (Northern Ireland)*, 1940 (*S. R. & O.* 1940, *No.* 1508)—*Mandamus.*

1. Persons employed by the Northern Ireland Road Transport Board who are members of a Trade Union have under sec. 29, sub-sec. 2 of the Road and Railway Transport Act (Northern Ireland), 1935, a statutory right to require matters in dispute between themselves and the Board in respect of rates of pay, hours of employment or other conditions of employment, to be referred for settlement by direct negotiation between the Board and the Trade Union in accordance with the provisions of that section.

2. Notwithstanding the said right conferred by the Road and Railway Transport Act (Northern Ireland), 1935, such disputes may be reported to the Ministry of Labour by a party to the dispute to be dealt with under the provisions of the Conditions of Employment and National Arbitration Order (Northern Ireland), 1940 (S.R. & O., 1940, No. 1508) and to be referred for settlement, if necessary, to the National Arbitration Tribunal (Northern Ireland) established by the said Order.

R. v. National Arbitration Tribunal and others [1943] 2 All E.R. 162 followed.

3. Inasmuch as the procedure under the Conditions of Employment and National Arbitration Order (Northern Ireland), 1940, provides a remedy not less beneficial convenient and effective than the procedure under section 29 of the Road and Railway Transport Act (Northern Ireland), 1935, the Court in the exercise of its discretion will not direct the issue of a Writ of Mandamus to compel the Board to enter into negotiations in accordance with the provisions of that section.

APPLICATION for the issue of a Writ of Mandamus. The facts appear in the judgment.

Porter, K.C., and *Patton* for the prosecutor.

Curran, K.C., and *M. W. Gibson* for the Northern Ireland Road Transport Board.

Cur. adv. vult.

The judgment of the Court (Brown and Black JJ.) was dellvered by Black, J. as follows :

This application comes before the Court on Notice of Motion (served pursuant to leave given by the Lord Chief Justice on the 26th November, 1943) for an Order requiring the Northern Ireland Road Transport Board to show cause why a Writ of Mandamus should not issue commanding the Board to enter into direct negotiations with the Ulster Transport and Allied Operatives Union in accordance with the provisions of s. 29 (2) (*a*) of the Road and Railway Transport Act (Northern Ireland), 1935, in regard to a demand by members of that Union employed by the Board for an increase of wages.

Section 29 (2) of the above-mentioned Act, which for convenience we shall refer to as the Act of 1935, provides that if at any time any question arises in respect of rates of pay, hours of employment or other conditions of employment in the case of persons employed by the Board—

(*a*) the matter in dispute shall in the first instance be referred to the Board and the trade union or unions of which the employed persons concerning whom the question arises are members for settlement by direct negotiation between the Board and the trade unions concerned ;

(*b*) if the Board and the trade unions concerned are unable to reach agreement the matter in dispute shall be referred to a negotiating committee consisting of equal numbers of representatives of the Board and of the trade unions ;

(*c*) if this negotiating committee is unable to reach agreement the matter in dispute shall be referred to a tribunal of three members—one selected by the trade unions concerned, one selected by the Board, and a chairman, being a judge or a practising barrister or solicitor of not less than ten years standing, to be agreed on by the parties or in default of agreement to be appointed by the Minister of Labour.

It appears from the affidavits that the applicant is

K.B.D. 1944.

R. (HENDRON) v. NORTHERN IRELAND ROAD TRANSPORT BOARD.

BLACK, J.

employed by the Board as an omnibus conductor and that he is a member of the Ulster Transport and Allied Operatives Union, a duly registered Trade Union and a Trade Union within the meaning of section 56 (1) of the Act of 1935. This Union seems to have been formed comparatively recently and we shall refer to it as the new Union. Before its formation the employees of the Board who belonged to Trade Unions were members either of the Amalgamated Transport and General Workers' Union or the National Union of Railwaymen, to which we shall refer as the old Unions. The Board had wage agreements with the old Unions and in July, 1943, they agreed with these old Unions to concede a wage increase of 4*s.* 6*d.* per week to employees in the Passenger Section of the Board's undertaking as from 5th July, 1943. It is stated that at this time the number of members of the new Union in the employment of the Board was approximately 800, nearly all of whom were engaged in the Passenger Section of the Undertaking, and that the total number of drivers and conductors in the Passenger Service of the Board was between 1,500 and 1,600. It is conceded, however, that about 140 employees who belonged to the new Union were also members of one or other of the old Unions.

On 9th July, 1943, the applicant and 750 other members of the new Union, all being employees of the Board, sent notices to the Board applying for increases of 15*s.* 0*d.* per week in their rates of pay and stating that should the Board not be prepared to grant this increase they should refer the matter to the new Union for settlement between the Union and the Board. To these notices the Board replied on 30th July, 1943, stating that they had been in contact with the Trade Unions with whom they had agreements and had agreed to the increase of 4*s.* 6*d.* a week. At a meeting held on the 4th August, 1943, of employees of the Board who were members of the new Union a resolution was passed protesting against this increase of 4*s.* 6*d.* per week and demanding that the Board should accede to the claim for 15*s.* 0*d.* per week. On the 7th August, 1943, the Secretary of the new Union wrote to the

Board enclosing a copy of this resolution. No reply was received from the Board, and on the 3rd September, 1943, the new Union's solicitor wrote on the Union's behalf to the Board recapitulating the correspondence and asking whether or not the Board was prepared to discuss with the new Union the question as to the increase of the rate of pay as provided for by section 29 of the Act of 1935. The only reply to this was what has, not unjustifiably, been described as a curt note dated 9th September, 1943, simply stating that the Board did not recognize the new Union. The Union's solicitor again wrote on 10th November, 1943, reiterating the demand for the increase of 15*s.* 0*d.* a week, requesting the Board to discuss the question with the Union, and stating that unless the Board either granted the increase or else agreed that the matter in dispute be referred in the manner required by section 29 (2) (*a*) of the Act of 1935, proceedings by way of mandamus would be instituted against the Board without further notice. In answer to this letter the Union's solicitor was simply informed by letter dated 19th November, 1943, that the Board had nothing further to add to the decision conveyed in their letter of 9th September.

In these circumstances the applicant has instituted the present proceedings. In the affidavit filed on behalf of the Board and made by the Chairman of the Board the facts alleged by the applicant are not really contested. The explanation given by the Board of their attitude is that it would be impossible to carry on the Board's undertaking except on the basis that the same rates of pay and the same working conditions applied to all employees of the same class and that, accordingly, where as in the present case the employees of a certain class do not all belong to the same Trade Union, the same agreement as to pay and conditions must operate in respect of all employees of the class to whichever Trade Union they belong. The Board say that they have always been willing to carry on negotiations with all Trade Unions representing any class of employees provided they act together in such negotiations. It is alleged, however, that this is

K.B.D. 1944.

R. (HENDRON) v. NORTHERN IRELAND ROAD TRANSPORT BOARD.

BLACK, J.

impracticable in the present case by reason of the fact that the Trade Unions concerned are in opposition to each other and that the old Unions have always refused and still refuse to enter into negotiations with the Board in conjunction with the new Union. The Chairman states that he has been informed by representatives of the old Unions that if the Board were to enter into negotiations with the new Union alone the old Unions' representatives and their members would refuse to recognize such negotiations or any agreement that might be thereby concluded and would take steps to prevent any such agreement being implemented. The Board accordingly give as their reason for refusing to recognize the new Union their apprehension that negotiations between the Board and the new Union would result in wide dislocation of public services.

We cannot see that the matters alleged in the affidavit filed on behalf of the Board constitute in law any answer to the request of the new Union that the disputes be referred in accordance with the procedure prescribed by section 29 (2) of the Act of 1935. We are clearly of opinion that the provisions of section 29 (2) were intended to be imperative and that any body of employees belonging to a particular Trade Union between whom and the Board any question had arisen in respect of rates of pay, hours of employment or other conditions of employment were given by section 29 (2) a statutory right to require the matter in dispute to be referred to negotiation between their Trade Union and the Board in accordance with the provisions of the section. All Trade Unions within the definition contained in section 56 (1) are placed on exactly the same footing by section 29. The Board is given no authority or discretion to choose that they will negotiate with certain Trade Unions but that they will refuse to negotiate with others. In our opinion the new Union is under section 29 entitled to recognition equally with the old Unions. We cannot understand upon what legal basis the Board claimed an authority simply to say that they refused to recognize the new Union. It seems to us

that in adopting such an attitude the Board were purporting to exercise an authority which was certainly not conferred upon them by their Act. As regards the difficulties alleged in operating section 29 when different members of a certain class of employees belong to different Trade Unions which are at odds with one another, these difficulties are and always have been inherent in the section. They may possibly constitute a reason for the Legislature reconsidering the section ; but while the section stands in its present form the Board are not entitled to refuse to be bound by its provisions. So too in regard to the possible consequences of the section being operated as it stands in such circumstances as are alleged to obtain in the present case. This also may be a matter for consideration by the Legislature.

Accordingly, if section 29 of the Act of 1935 were the only method by which the applicant and his fellow members of the new Union could get their application for an increase of pay dealt with and decided, we are of opinion that the applicant would be entitled to the order which he seeks.

The grant of a Writ of Mandamus is, however, a matter for the discretion of the Court. It is not a Writ of right ; and in particular the Court will not as a general rule direct the issue of a Writ of Mandamus where there is available to the applicant an alternative remedy which is not less convenient, beneficial and effective. Such a remedy need not necessarily be a remedy by proceedings in the Courts. Thus in *R. v. Army Council, ex parte Ravenscroft* (1), one of the grounds upon which Viscount Reading, C.J., considered that the writ of mandamus ought not to issue was that the prosecutor could have complained to the Army Council under section 42 of the Army Act. In the present case Mr. Curran on behalf of the Board contends that a remedy certainly not less convenient, beneficial and effective than the procedure under section 29 was open to the applicant and his fellow members of the new Union under the provisions of the Conditions of Employment and National Arbitra-

(1) [1917] 2 K.B. 504.

K.B.D. 1944.

R. (HENDRON) v. NORTHERN IRELAND ROAD TRANSPORT BOARD.

BLACK, J.

tion Order (Northern Ireland), 1940 (S. R. & O. 1940, No. 1508), which we shall refer to as the National Arbitration Order. The suggestion that the dispute could be dealt with under the National Arbitration Order was never put forward by the Board in the correspondence nor is it mentioned in the affidavit filed on their behalf. Nevertheless, now that it has been raised we are bound to deal with it. The National Arbitration Order was made by the Ministry of Labour under Regulation 58AA of the Defence (General) Regulations, 1939, and in its provisions it follows closely the terms of the corresponding Order previously made for Great Britain (S. R. & O. 1940, No. 1305). A comparison of the procedure for the settlement of disputes prescribed by section 29 of the Act of 1935 with the procedure under the Arbitration Order can, we think, leave no doubt as to the advantages and superiority of the latter procedure. It is much more simple ; it is far more speedy ; unlike the section 29 procedure it can readily be operated even though one of the disputants is unwilling to facilitate arbitration ; and it avoids the difficulties and the possible deadlock which are to be apprehended in an attempt to operate the section 29 procedure in cases such as the present where in a group of employees of the same class and to whom the same wages scales ought to apply, it is found that some employees belong to one Trade Union and some to another, that one of the Unions refuses to take part in any negotiations to which the other Union is a party, and that to complicate the matter still further a substantial number of the employees concerned are members of both Unions. Moreover, the procedure under the National Arbitration Order has the further advantage that the ultimate reference is to a standing Tribunal which has now gained wide experience in dealing with and adjusting wages disputes and other industrial problems. If it was open to the applicant and his fellow employees who were members of the new Union to have their claim for an increase of wages dealt with under the National Arbitration Order it can scarcely be contended that he had not available to him a remedy

not less convenient, beneficial and effective than the remedy under section 29 of the Act of 1935. Indeed in his reply on behalf of the applicant Mr. Patton did not seek so to contend. He strongly contended, however, that the procedure under the National Arbitration Order was not open to the applicant; that upon the proper interpretation of the scope of the Order the applicant could not have had his claim dealt with under the Order. His argument was that the jurisdiction of the Arbitration Tribunal set up by the Order was defined by the opening words of Article 1 of the Order and that Article 2 of the Order deals only with procedure, the scope of Article 2 being accurately described in the marginal note to that Article. Accordingly, it is said that the Tribunal can only deal with trade disputes "which cannot "otherwise be determined" and that the present dispute is outside the Tribunal's jurisdiction inasmuch as machinery for determining it exists under section 29 of the Act of 1935. We do not think that this argument is sound. It really amounts to construing the opening words of Article 1 as though they read "For "the purpose of settling trade disputes for the "determination of which no machinery exists" and limiting the operation of the Order to cases in which there is no machinery already in existence for settling disputes. This cannot possibly be the meaning of the Order. For Article 2 (2) proceeds to deal with the course to be adopted in a case where machinery already does exist under an agreement to which the parties are organizations representative of employers and workers respectively. Accordingly Article 1 of the Order cannot be read as limiting the jurisdiction of the Tribunal in the manner in which Mr. Patton contends. Precisely the same contention was raised in England in the case of *R. v. National Arbitration Tribunal and others* (1), and was expressly rejected by each of the three Judges who constituted the Court in that case. In their view the jurisdiction of the National Arbitration Tribunal is not to be found in the introductory words of Article 1 but is to be ascer-

(1) [1943] 2 All E.R. 162.

K.B.D. 1944.

R. (HENDRON) v. NORTHERN IRELAND ROAD TRANSPORT BOARD.

BLACK, J.

tained from the Order as a whole. And reading the Order as a whole they came to the conclusion that it conferred jurisdiction on the Tribunal to deal with any trade dispute which had been duly referred to it under the provisions of the Order. We entirely agree with this conclusion which appears to be in accordance with the approach to the matter of our own Court in *Employees of Murray, Sons & Company Limited v. Murray, Sons & Company Limited* (1).

Accordingly we are of opinion that in the present case the Court ought not to direct the issue of the Writ of Mandamus sought by the applicant inasmuch as under the provisions of the National Arbitration Order there was open to him and his fellow members of the new Union, by reporting the dispute to the Ministry of Labour under Article 2 of that Order, an alternative remedy not less convenient, beneficial and effective than the procedure under section 29 of the Act of 1935. The application will therefore be refused, but in the circumstances of the case we make no order for costs as against the applicant.

Solicitor for W. J. Hendron : *Leonard I. G. Fox.*
Solicitor for the Northern Ireland Road Transport Board : *J. Dunville Coates.*

M.V.P.

(1) [1943] N.I. 94.

RUSSELL (INSPECTOR OF TAXES), Appellant ; SCOTT, Respondent.

C.A. 1944.

Feb. 10, 17, 21, 22. Mar. 9.

Income Tax—Sand-pit—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Schedule A*, *No.* 3, *rule* 3—"*Other concerns of the like nature.*"

The respondent owned a sand-pit and he permitted persons to come upon his land, dig the sand and carry it away, paying him for it at prices varying from sixpence to ninepence per ton according to the quality; these payments were made without deduction of Income Tax. The respondent employed a man to keep records of the amount of sand taken; he took no part himself in winning the sand, but simply managed the pit. The respondent was assessed to income tax in respect of the sums so paid to him.

Held, by the Court of Appeal (Andrews, L.C.J., Babington and Murphy, L.JJ.) that Schedule A of the Income Tax Act, 1918, (8 & 9 Geo. 5, c. 40), No. III, rule 3, did not apply to the case.

CASE STATED under the Income Tax Act, 1918, sec. 149, by the Commissioners for the special purposes of the Income Tax Acts.

At a meeting of the Commissioners held on 20th November, 1942, the respondent appealed against assessments to Income Tax made on him, which included sums received by him in the following circumstances.

The respondent owned lands in which there was a sand-pit, and sold sand to persons who came upon the lands and dug and carried away the sand therefrom; he received so much per ton for such sand the price varying between sixpence and ninepence according to the quality of the sand; he employed a man to keep records of the amount of sand taken; he took no part himself in winning the sand, but simply managed the sand-pit. He had no written agreement with the purchasers, but he received payment of the full price per ton without deduction of income tax, and it was the sums so received which formed the subject matter of the assessments appealed against. No evidence was adduced before the Commissioners as to whether these sums were, or were not, payable

C.A. 1944.

RUSSELL (INSPECTOR OF TAXES) Appellant v. SCOTT, Respondent

wholly out of profits and gains brought into charge to tax.

MacDermott, A.-G., Curran, K.C. and *Nicholson* for the appellant.

McCoy, K.C., and *McVeigh* for the respondents.

ANDREWS, L.C.J.

ANDREWS, L.C.J. : The point involved in this case is confined to a narrow compass. Briefly expressed, it is whether a certain sand-pit, the property of the respondent, falls within the scope of Rule 3 No. III of Schedule A contained in the First Schedule to the Income Tax Act, 1918, so that the profits thereof are taxable thereunder. Nothing in this judgment is intended to affect the respondent's liability under any other Rule or Schedule of the Income Tax code.

The matter comes before us on a Case Stated under section 149 of the Income Tax Act, 1918, by the Commissioners for the Special Purposes of the Income Tax Acts. At the hearing before them at Londonderry the respondent appealed against certain assessments made upon him for the years 1940/41, 1941/42 and 1942/43 in the sums of £4,000, £10,000 and £10,000, respectively. These assessments included certain sums received by the respondent in respect of sales of sand from the said sand-pit to builders and others who required it. The case stated is most meagre in its particulars regarding the nature and extent of the sand-pit ; but it appears that the persons who required the sand came into the sand-pit and dug and carried away the sand therefrom at the prices of 6*d.* and 9*d.* per ton, graded according to quality. These sums were paid in full without deduction of tax. The respondent did not win or apparently do any other work in connection with the sand. It is stated that he " simply manages the sand-pit " ; but, whether this is intended to mean anything more than that he employs a man to keep records of the sand taken, does not appear. The Commissioners who heard the appeal were of opinion that the sums received in full by the respondent in respect of the sales of sand were rent

payable in respect of an easement within the meaning of those words in section 21 of the Finance Act, 1934, that that section made it mandatory to pay such rents under deduction of tax, and that, if not so paid, and in the absence of any evidence as to whether they fall within Rule 19 or Rule 21 All Schedules: Rules, there was no jurisdiction to assess the recipient in respect thereof. They, accordingly, discharged the assessments. This finding, it is agreed, is unsustainable, and no attempt was made to support it before Brown, J., who heard the Case Stated in the High Court, or in this Court. No easement existed, and, accordingly, no rent could be said to have been payable in respect thereof.

Before Brown, J., it was contended that the case fell within either Rule 1 or Rule 3 of No. III of Schedule A, but the learned Judge rejected both submissions; and before us the Attorney-General admitted that without further evidence or findings in regard to the geological nature of sand he could not succeed in bringing the case within Rule 1. The issue for our determination is, accordingly, narrowed down to that stated in the opening paragraph of this judgment. It is, indeed, unfortunate that we are called upon to decide a point which was apparently not before the Commissioners when stating this case.

Counsel for both parties dealt fully in argument with the nature of the tax under Schedule A which is charged in respect of the property in all lands, tenements, hereditaments, and heritages in the United Kingdom for every twenty shillings of the annual value thereof. It is unnecessary in referring to the different numbers or classes into which such lands are sub-divided in the Schedule to say more than that No. I embraces all lands which do not fall within Nos. 2 or 3; and it is the submission of the respondent that his lands, including the sand-pit, fall within this class No. I in which the annual value is determined, under what is designated as the "General Rule," on a rack rent basis irrespective of profits. Clearly a sand-pit does not come within No. II which is confined to such property as tithes, royalties, and fines received

C.A. 1944.

RUSSELL (INSPECTOR OF TAXES), Appellant v. SCOTT, Respondent

ANDREWS, L.C.J.

in consideration of a demise. No. III contains nine Rules for estimating the annual value of "certain "other lands, tenements, hereditaments or heritages "which are not to be charged according to the pre- "ceding General Rule, and for determining the person "chargeable." The first of these (no longer relied upon in the present case stated) provides that in the case of quarries of stone, slate, limestone, or chalk, the annual value shall be understood to be the profits of the preceding year. Rule 2 relates to mines of coal, tin, lead, copper, mundie, iron and other mines where the annual value is understood to be the average amount for one year of the profits of the five preceding years. The properties embraced in these two Rules are clearly defined. In the one we find certain quarries of a specified character; in the other certain mines.

The drafting of Rule 3 is essentially different. Its importance necessitates my setting it out *in extenso* :—

> "In the case of ironworks, gasworks, salt springs "or works, alum mines or works, waterworks, "streams of water, canals, inland navigations, "docks, drains or levels, fishings, rights of markets "and fairs, tolls, railways and other ways, bridges, "ferries, and other concerns of the like nature "having profits from or arising out of any lands, "tenements, hereditaments or heritages, the annual "value shall be understood to be the profits of the "preceding year."

Now this detailed enumeration of so-called "concerns" does not expressly include a sand-pit; and, accordingly, the sand-pit in the present case can only be brought within the Rule if it is properly described as a "concern of the like nature." My first difficulty in so holding is that unfortunately I do not find in the case stated sufficient material to enable me to form a definite opinion as to whether or not this particular sand-pit would be aptly designated a "concern." This is a word, no doubt, of somewhat wide import and application. The appropriate meaning which is assigned to it in the New English Dictionary, Vol. II, p. 762, No. 10, is "a business "organization; a business, a firm; a commercial or

" manufacturing establishment." That a sand-pit may be a " concern " of this character I have no doubt. The owner of a sand-pit may not only " manage " it ; he may operate it, and carry on a business in connection with it with the assistance of his own employees, and possibly also with the aid of certain mechanical plant or equipment which he has provided for the purpose. No one could question a finding that such a sand-pit constituted a " concern." On the other hand, it is in my opinion equally clear that if the owner told a neighbour that he could enter upon his lands and take therefrom a few loads of sand for his own purposes, this would not make the portion of the lands from which the sand was taken a " concern," whether such sand was given voluntarily or sold for reward. The present appears to me to be an intermediate case ; but, in the absence of particulars such as those to which I have referred in an earlier part of this judgment, and in the further absence of any express finding of fact by the Special Commissioners, I am not prepared to express any definite opinion or myself to arrive at any conclusive finding thereon. Perhaps, on such evidence as we have, it looks more consistent with a mere exploitation of his rights of property than the establishment of a " concern " in the commercial or trading sense of the term.

I desire, however, to go further. It would not be sufficient to find that this sand-pit is a " concern." To come within Rule 3 of No. III it must be a " concern " *of the like nature*." I confess that these words in the context in which they are placed have for me no clear or certain meaning whatever. What nature, for example, is common to ironworks and ferries, to salt springs and rights of market, to alum mines and railways ? Some of the concerns so specified relate to land, some to waters, some are rights corporeal and some incorporeal, some provide a medium for transport whilst others are of a wholly fixed and stationary character. What is the genus common to them all ? What is the common feature in them which must also be found in any other " concern " before it can be brought within Rule 3 ? My exam-

C.A. 1944.

RUSSELL (INSPECTOR OF TAXES), Appellant, *v.* SCOTT, Respondent

ANDREWS, L.C.J.

ination of authority has failed to provide me with any satisfactory answer. The learned Attorney-General submitted that it is such concerns, and only such concerns, as by their nature require a special and active user of the land that come within the Rule. He may be right, but the statute itself does not say so. Let us then consider some of the relevant authorities. In *Edmonds v. Eastwood and others* (1), which it is rightly pointed out was not a revenue case, the opinion of the Court (consisting of Pollock, C.B., and Martin, Watson and Channel, BB.) clearly was that "the case of a brickfield was not intended to be "included within No. III"; and, not being within either No. II or No. III, it falls within No. I because of the more general character of its words. I am unable, however, to find in any of the judgments any helpful interpretation of the words "other concerns "of a like nature." Thus Watson, B., after quoting Rule 3 down to the words "of the like nature," merely adds: "These latter words refer to works, etc., *of* "*the same kind* as those before mentioned; but the "digging clay and making it into bricks is a very "different matter." One experiences just the same difficulty in assigning a meaning to the words "of the "same kind" as one finds in interpreting the words "of the same nature." What is the "nature" or what is the "kind" referred to?

The words of Rule 3 of No. III came under review also in the case of *Edinburgh Southern Cemetery Co. v. Kinmont* (2), in which the Court of Exchequer in Scotland held that where the Cemetery Company sold the use in perpetuity of grave spaces in the cemetery to be used for burial purposes only the company was assessable under the 3rd Rule of No. III Schedule A. I am not called upon in the present case to express any definite opinion by way of approval or disapproval of this decision as there appears to me to be little in common between a public cemetery and a private sand-pit. One naturally looks, however, to see what there was found to be "of a like nature" in a cemetery,

(1) 2 H. & N. 811, 157 E. R. 334.

(2) 2 Tax Cases 516.

such as that in the Edinburgh case, and the several concerns specifically enumerated in Rule 3. Lord President Inglis merely said: "It appears to me that "the present Cemetery Company falls very fairly "within the words 'other concerns of a like nature,' "as occurring in that rule, and therefore the charge "should be made under No. 3 of Schedule A, Rule 3." Lord Shand came to closer quarters with the problem, but to me his words are not convincing: "At first "sight of course," he says: "the notion that a "Cemetery Company is a concern of the like nature "with any of the others mentioned is a little startling, "but the true solution of that question is to be found "in this, that all of these different concerns relate to "companies which, having purchased or acquired "land, remain in the occupation and use of that land "themselves, and are using it for the purpose of some "trade or business whereby they acquire profits. If "any company has that feature in common with the "iron works and other works that are enumerated "under Rule 3 of No. III of the statute, then I think "it falls to be assessed in terms of that rule." Twice in these words does Lord Shand refer to the apparent necessity for the concern being a "company," which seems to me to be an unwarranted assertion, not only because Rule 3 contains no words which justify it, but also because the very next Rule (No. 4) opens with the words: "Tax under the above Rules shall "be assessed and charged on *the person* or body of "persons carrying on the concern." Likewise, I am unable to accept his last condition—that the company "are using it for the purpose of some trade or "business." The several quarries and mines enumerated in Rules 1 and 2 respectively would stand the test of this criterion, yet they cannot fall to be assessed both under one of those Rules and also under Rule 3. Finally, Lord McLaren refers to the general words which, as he says, are "descriptive of things *ejusdem* "*generis*." He issues a warning that one must be careful not to give too wide an extension to such general words, and adds that he would not be disposed to hold that any unnamed business or trade carried

C.A. 1944.

RUSSELL (INSPECTOR OF TAXES), Appellant v. SCOTT, Respondent

ANDREWS, L.C.J.

on by the use of land would fall under Rule 3 if it were possible by fair construction to bring it within Rules 1 or 2. "It is certainly not sufficient," he continues, "to bring a particular use of land within the scope of "Rule 3 that the proprietor of the land is using it in "connexion with his trade or for purposes of trade, "because in such cases it is generally possible to "separate the income into two parts, the one repre- "senting the rent or annual value of the heritable "property, and the other representing commercial "profit. Where this can be done, the proper mode "of assessing seems to me (to be) to assess under "Schedule A in respect of annual value and also under "Schedule D for the commercial profits of the business "or manufacture carried on with the hereditable "subjects. But there are cases where it is very "difficult to separate the income of a proprietor into "rental and commercial profits. Rule 3 appears to "have been devised to meet such cases, though it is "proper to observe that the enumeration also includes "works of a description in which it seems to be quite "possible to make such a separation into income "assessable under Schedule A and income assessable "under Schedule D." I shall only say by way of comment, but with all possible respect, that the divergent views of the learned Lords do not assist me in determining the genus ; and that Lord McLaren, in laying down his test, appears to me rather to be legislating than interpreting the words "of the like "nature." Even, however, if his test be accepted as the proper one, and if it be applied to the present case, it does not in my opinion assist the appellant, on whose behalf the case was cited by the Attorney-General, as there should not be the slightest difficulty in this case in separating the income or commercial profit derived from the sand-pit trade or business from that which Lord McLaren calls "the rent or "annual value of the heritable property."

In *Humber Conservancy Board v. Bater* (1), Scrutton, J., (as he then was) held that certain statutory contributions, which the Conservancy Board, who were

(1) [1914] 3 K.B. 449.

the lessees of certain foreshores and the bed of the river Humber, received from four railway companies and a canal company, were liable to income tax as being either profits from an "inland navigation" within Schedule A No. III, r. 3, or as annual profits and gains within section 2, Schedule D—he was "inclined to think" the former. I shall only say that if the learned Judge thought there was a doubt in that case as to whether the Board's said receipts fell to be taxed under Schedule A No. III, r. 3, there would appear to me to be infinitely greater room for doubt in the present. In the course of his judgment he says (at p. 455) that "rule 3 sets out a list of things "all of which have some connection with land" and that "the whole classification is directed to profits in "some way arising out of land or interests in lands." With both these dicta I express my respectful concurrence; but it is quite another thing to say that all profits in some way arising out of land or interests in land are taxable under No. III, r. 3. If this were the true test of inclusion in No. III, r. 3, one would naturally ask, Why specially enumerate any concerns in that rule? Indeed, under such a test all lands and interests in lands in any part of Schedule A would come within the scope of the rule provided they produced taxable profits. Expressed in another way, it seems to me that a sole test of "profits from "or arising out of lands" would wholly ignore the words "of the like nature" in the rule. In effect it would interpret the rule in the manner which I suggested for consideration during the argument, namely, that the word "having" might be read as "in that "they have," or, as the learned Attorney-General perhaps more simply suggested, that "i.e.," be interposed in the rule between the words "nature" and "having profits." The simplicity of such a construction appeals to one; but on reflection I am of opinion that this would be a dangerous method of interpretation to introduce into the construction of statutes, and that it would be doing unjustifiable violence to the actual language of the rule. Moreover, in the present case one would, it seems to me, be

C.A. 1944.

RUSSELL (INSPECTOR OF TAXES), Appellant v. SCOTT, Respondent

ANDREWS, L.C.J.

ignoring the earlier history of the rule, for it was only in the Act of 1918 that the words "having profits" were introduced into it.

The decision of the House of Lords in *Fry v. Salisbury House Estate Ltd.* (1), that rents received from a block of buildings let out as unfurnished offices to tenants were profits arising from the ownership of land in respect of which the assessment under Schedule A was exhaustive, and that they therefore could not be included in the assessment under Schedule D as trade receipts of the company—does not directly affect the present case, and I refer to it only because Lord Macmillan, immediately prior to his citation from Lord McLaren's judgment in the Edinburgh case (2) refers to rule 3 of No. III as comprising "an enumer- "ated series of undertakings *mostly of a public utility* "*character* and other concerns of the like nature." If by these words Lord Macmillan is to be understood as implying that the true genus of the rule is public utility clearly the present sand-pit, which is privately owned and managed for personal profit, does not fall within its scope. In this connection it may not be regarded as inappropriate to mention that Sir Francis Gore, solicitor to the Inland Revenue, in his Article upon Income Tax in *Halsbury's Laws of England*, vol. 16, p. 619, whilst describing the properties comprised in class No. I of Schedule A, says that it applies generally to all corporeal hereditaments capable of actual physical occupation with the exception of mines and quarries "and certain other *large trading* "*concerns* enumerated in Class No. 3." As indicating another possible genus these words equally fail to embrace this private sand-pit.

Finally, I would refer to the words of Lord Buckmaster in *Commissioners of Inland Revenue v. Forth Conservancy Board* (3), in which the terms of Schedule A No. III, rule 3, came under consideration because of the claim that the surplus of certain shipping dues levied by the Conservancy Board was a profit arising out of lands or heritages within Schedule A and

(1) [1930] A.C. 432.
(2) 2 Tax Cases 516.
(3) [1929] A.C. 213.

assessable as such. In the opening words of his speech (at p. 215) Lord Buckmaster states that the Commissioners of Inland Revenue had deliberately elected to base their claim on Schedule A No. III, r. 3, which he refers to as a "narrow foundation"; and again (at p. 218), in rejecting the claim, he expresses it as his view that "there is no particular "reason why an extended interpretation should be "given to the illustration of properties subject to the "charge contained in the third sub-head."

It is in this state of the law that I bear in mind the fact that we are called upon in the present case to interpret the language of a rule forming part of a code to which the learned author of *Konstam upon the Law of Income Tax* states in the 9th (1943) Edit. at p. 6 "ordinary canons of construction cannot be applied." He says of this code that it is unsafe to assume without diligent study that the same word is used in two places in the same sense, that different words are not used to mean the same thing, or that any series of expressions or any set of provisions is intended to be exhaustive, so that what is not mentioned is excluded. Lord Wrenbury, Earl Loreburn, and more recently Lord Macmillan in *City of London Commissioners v. Gibbs* (1), are amongst those who have referred to the code in highly disparaging terms. In reference to the principle of construction to be applied to the code we have also the opinions of many Judges of the highest eminence. These opinions will be found conveniently collected in *Beal on Rules of Legal Interpretation.* From them I make two selections. The first is the words of Bayley, J., in *Denn & Manifold v. Diamond* (2), at p. 245, that it is a settled rule of law that every charge upon the subject must be imposed by clear and unambiguous language. The second—a hundred years later—is from the speech of Lord Buckmaster in *Ormond Investment Co. v. Betts* (3) (at p. 151),where, after citing with approval from the speech of Lord Blackburn in *Coltness Iron Co. v. Black* (4), at p. 330, he says that the imposition of a tax must be in plain

(1) [1942] A.C. 424.
(2) 4 B. & C. 243, 245.
(3) [1928] A.C. 143. 151.
(4) 6 A.C. 315, 330

C.A. 1944.

RUSSELL (INSPECTOR OF TAXES), Appellant v. SCOTT, Respondent

ANDREWS, L.C.J.

terms—kindred in that respect to the creation of a penalty or the establishment of a crime.

In my opinion if the practice of the past in regard to the taxation of the profits of sand-pits, gravel-pits, brickfields, and the like, is to be altered, and if such profits are to be brought within the scope of the taxation imposed by Schedule A No. III, r. 3, this should only be effected by unambiguous amending legislation or by authoritative decision of the House of Lords.

We affirm the decision of Brown, J. The respondent must have his costs of the Case Stated.

BABINGTON, L.J.

BABINGTON, L.J.: I agree that the decision of Brown, J., must be affirmed.

The Lord Chief Justice has summarised the facts and arguments and I will not repeat them but proceed at once to the point which appears to me to be decisive in the respondent's favour.

It was not seriously argued that this sand-pit is a quarry of stone within the meaning of Schedule A No. III, Rule 1. No evidence was given nor any authority cited in support of this contention which accordingly fails.

The appellant must therefore bring the case within the express words of Rule 3 by showing that as worked by the respondent the sand-pit is a concern of the like nature with all or some of the concerns mentioned in the Rule.

It has been argued by counsel for the respondent that in construing a taxing statute express words must be used or obvious intention shown to impose liability on the taxpayer.

It is not necessary to rely on any special rule of construction in this case but I am not satisfied that there is any peculiar canon applying to taxing statutes, and though a number of cases have been cited which are said to support this contention, they amount to no more than this in my opinion, that when the Legislature purports to impose a direct liability or charge, the intention to do so must be expressed in

plain and unambiguous language, whether the charge be by the way of tax or otherwise, and I have not heard any case cited in which words have been held not to impose a tax which would have imposed liability other than by way of tax.

Upon any canon of construction the appellant must bring this sand-pit within Rule 3 as being a concern of the like nature and must in the first place show that as used by the respondent it is a concern.

The evidence as to this is set out in the case stated and is very meagre. It can be reduced to two simple statements of fact. *First*, that the respondent owns a farm on which there is a sand-pit, and *secondly*, that he sells sand from this pit to all comers at 6*d.* to 9*d.* a ton. Is this sufficient to constitute a concern within the meaning of Rule 3 ? If it is, then every farmer or owner of land who sells any substance found on his land carries on a concern within the Rule.

The size of the concern cannot be the test of its legal nature and it is impossible to say that a man who sells hundreds or thousands of tons of sand from a pit on his land is in law carrying on a concern while a man selling a few tons is merely exercising his rights of ownership.

It may be that an owner could carry on the sale of sand off his land under circumstances that would constitute a concern but this would be a matter of fact and the fact would have to be found on evidence adequate to support it. There is no such finding in this case nor any such evidence, and we are asked to hold that the mere sale of sand in law constitutes a concern. When the various concerns enumerated in the Rule are scrutinised it will be seen, however, that something more than a mere sale is required to constitute a concern—how much more being a question of fact which must be found and cannot be implied as a matter of law.

If there be any finding as to the nature of the sales in the present case Mr. McCoy maintains it is in the respondent's favour and that the finding of the Special Commissioners in paragraph six of the case stated that the sums received in respect of the sales were

C.A. 1944.

RUSSELL (INSPECTOR OF TAXES), Appellant v. SCOTT, Respondent

BABINGTON, L.J.

rent in respect of an easement, negatives the existence of a concern and is conclusive in his client's favour.

Whether this be so or not, I hold that in the absence of any positive finding that these sales constituted a concern this Court cannot determine this question in the appellant's favour as matter of law, for this would involve the proposition that every farmer or owner of land who sells any substance found on his land thereby carries on a concern within Rule 3 irrespective of the size or nature of his operations. This conclusion is unsustainable. It would make the working of a turf bank, a sand-pit or gravel-pit by an owner who sells turf, sand, gravel or clay off his farm to his neighbours a concern, and the terms of Rules 1 and 3 do not suggest that the Legislature intended to lay down any such rule.

It is not necessary to express any opinion as to whether, if this be a concern, it is one of a like nature with the concerns enumerated in Rule 3.

These concerns do not constitute a genus as there is no similarity between them. The Attorney-General argued that they are connected by user. He said that each of these concerns has to do with a special user of land and that when you find a special user of land, whatever that user may be, there is a concern of a like nature with those enumerated. This construction assumes the existence of a *concern*, and was based mainly on the case of the *London Cemetery Co. v. Barnes* (1), but in that case the cemetery carried on upon the lands was clearly a concern and the sole question was whether it was of the like nature with the enumerated concerns.

It was held that the cemetery was of the like nature, but I do not think it is necessary to consider whether if the user of the sand-pit in the present case had been proved to constitute a concern the same rule would apply, and I express no opinion one way or the other.

The distinction between cases in which a concern has been found to exist and those in which there is no concern may appear to be a fine one, but I think a comparison between the *Cemetery case* (1) and *Roberts*

(1) [1917] 2 K.B. 496.

v. The Executors of Lord Belhaven (1), where the sale of colliery dross off the lands was held not to be profits but the price of the material sold shows that this distinction determines liability. In the former case there was a concern and in the latter I read the decision as negativing the existence of a concern.

I hold accordingly that it has not been established that this sale of sand amounted to carrying on a concern, from which it follows that the respondent cannot be taxed under Rule 3.

The terms of Rule 1 substantiate this view. That Rule applies to quarries of stone, slate, etc., whether their working constitutes a concern or not. Sand-pits are not included, as they might have been if the Legislature intended them to be subject to tax, and they are therefore only taxable when their working constitutes a concern. This suggests that the Legislature did not intend to tax sand-pits as concerns irrespective of the way they are worked, otherwise they would have been grouped along with mines in Rule 1.

As there is no evidence that the respondent was carrying on a concern within the meaning of Rule 3, the appeal must be dismissed with costs.

MURPHY, L.J. : I agree.

The question arising on this appeal is whether the operations described in paragraph 3 of the case stated constitute a " concern of the like nature " within the meaning of those words in Rule III, 3, of Schedule A of the Income Tax Act, 1918. While the question is a net one, its solution is beset with difficulties. At the outset it appears to me that, owing, doubtless, to the ground on which the decision of the Commissioners was based, the facts relating to the alleged " concern " are stated in the most meagre fashion. We are not told the size of the holding from which the sand is being taken, the period during which sand has been taken from this pit, nor the number of " builders and any others " who have been so taking

(1) [1925] S.C. 635.

C.A. 1944.

RUSSELL (INSPECTOR OF TAXES), Appellant v. SCOTT. Respondent

MURPHY, L.J.

sand; these are some of the factors which might throw light on the question for our decision.

On the facts as stated, it appears that on the lands of Mr. Scott, builders and others dig and carry away sand from a sand-pit, paying 6*d.* to 9*d.* a ton (presumably according to quality) for such sand. Mr. Scott "manages" the pit—the nature of such management not being stated—and employs a man to keep a record of the amount of sand taken. Mr. McCoy submits that this does not constitute a "concern," and, secondly, that, if a concern, it is not of the like nature with those enumerated in Rule III, 3. Trade as defined by section 237 of the Income Tax Act, 1918, includes "every" . . . "concern in the way of "trade," but neither this definition nor the other references to "concern" in the Act or Schedules throw any light on the present question.

The principle enunciated by Lord Blackburn in *Coltness Iron Co. v. Black* (1), at p. 330, in the words: "No tax can be imposed on the subject without words "in an Act of Parliament clearly shewing an intention "to lay a burden on him," was specifically adopted and approved by Lord Buckmaster in *Ormond Investment Co. v. Betts* (2), at p. 151, where, in quoting Lord Blackburn's words, he says that there is "a principle "well known to the common law and that has not "been and ought not to be weakened—namely, that "the imposition of a tax must be in plain terms," and added, "It is in that respect kindred to the "creation of a penalty or the establishment of a crime, "the subject ought not to be involved in these liabilities "by an elaborate process of hair-splitting arguments." No doubt Lord Sumner (*Brown v. National Provident Institution* (3), at p. 257) says: "Applied to income tax, however, this is an ironical proposition." but I consider that I must have regard to the principle in arriving at a decision in the present case.

Even in 1842, I would assume that sand-pits must have been a not uncommon feature of the countryside, and if it had been intended that the profits from such

(1) 6 A.C. 315, 330.
(2) [1928] A.C. 143, 151.
(3) [1921] 2 A.C. 222, 257.

sand-pits should be brought within Rule III of Schedule A, it seems to me remarkable that they were not included specifically in rule 1, which enumerates not merely quarries of stone but also quarries of limestone and chalk. It would have been more natural to include sand-pits in Rule 1 than in Rule 3, but, again, if the intention of the Legislature had been to include sand-pits they might have been added to the remarkable list of diverse "concerns" in Rule 3. While I do not agree with Mr. McCoy that a "concern" must connote something which requires substantial machinery or buildings, I am not satisfied that this selling of sand by Mr. Scott, on such information as we can glean from the case stated, constitutes a "concern" within the meaning of that word in Rule III, 3. It is to be observed that the Commissioners have not expressly held that these sales of sand constituted a "concern" (while such a finding may be implicit in their decision on section 21 of the Finance Act, 1939), and this would appear to me to be a question of fact for the Special Commissioners if they were of opinion that there was any evidence to warrant such a finding (see *Shingler v. P. Williams & Sons* (1). Shingler's case (1) may be distinguishable on the ground that the slag had been brought on the land by human activity, but it is certainly instructive as the Special Commissioners had found that the respondents, who had granted to a company the right to get and carry away for seven years, in consideration of payments on a royalty basis, the slag which covered a field of ten acres the property of the respondents, were not carrying on a trade within Schedule D. If the sale of sand as described in the case stated constitutes a "concern" so, necessarily, would the sale by a farmer of turf to persons who cut and won it on his holding.

Mr. McCoy stated that the present case is the first instance in Ireland of an attempt to assess under Rule III of Schedule A a sand-pit worked as this pit has been worked, and I did not understand that this was seriously challenged; the case of *Stretford v. Mole and Lee* (2), cited by Mr. Curran, was decided in

(1) 49 T.L.R. 221. (2) 24 Tax Cases 20.

C.A. 1944.

RUSSELL (INSPECTOR OF TAXES), Appellant v. SCOTT, Respondent

MURPHY, L.J.

1941, and may have been based on the view that a gravel-pit was a quarry of stone. The war has doubtless increased greatly the demand for sand, but it is certainly remarkable that for one hundred years no instance is known of an argument that sand-pits come within Rule III of Schedule A.

If the working of this sand-pit does not constitute a "concern" it is unnecessary to consider whether or not it is a "concern of the like nature," with those enumerated in Rule III, 3, but having regard to the arguments addressed to us I desire to express my opinion on the construction of this phrase.

Apart from authority I should have no hesitation in coming to the conclusion that these remarkably diverse "concerns" did not constitute any genus—I entirely fail to appreciate any common feature, "thread," or "theme," that would constitute a connecting link between (for example) ironworks, salt springs and fishings. The arguments that fishings involved a "special use of land," or "a substantial "use of the corpus of land," carry no conviction to my mind. It has not been very strenuously argued on behalf of the appellant that the words "other "concerns of the like nature" should be related not to a preceding genus but to the several enumerated "concerns," but, even if such a construction could be adopted, I do not think that this sand-pit is "of the "like nature" with any of the enumerated "concerns." To constitute such a "like nature" it is not sufficient, in my opinion, to say that sand constitutes a part of the soil of Mr. Scott's holding. The two cases which have a direct bearing on the question for our decision are *Edmonds v. Eastwood* (1), and *Edinburgh Sonthern Cemetery Co. v. Kinmont* (2). There are several passages in the judgments in the first case which go to show that brickfields are not of a like nature with any of the concerns enumerated in Rule III, 3, but this point was not, definitely, decided. In the second case it was decided that an, unincorporated, Cemetery company which granted for payment the right of

(1) 2 H. & N. 811, 157 E.R. 334.

(2) 2 Tax Cases 516, 27 S.L.R. 71.

burial in perpetuity and distributed the profits amongst itsmembers, were wrongly assessed under the 6th Rule of Schedule A No. II (now No. II, 7) but should have been assessed under the 3rd rule of Number III Schedule A. The Lord President (Inglis) merely stated that "the present cemetery company falls "very fairly within the words 'other concerns of the "'like nature' as occurring in that rule." Lord Shand, who said that at first sight the notion was "startling," held that "the true solution of that "question is to be found in this, that all of these "different concerns relate to companies which having "purchased or acquired land, remain in the occupation "and use of that land themselves, and are using it "for the purpose of some trade or business whereby "they acquire profits." Lord Adam concurred "on "the same grounds." Lord McLaren, in a closely reasoned judgment, said that Rule III, 3, appeared to have been devised to meet cases where it is very difficult to separate the income of a proprietor into rental and commercial profits and that according to the constitution of the cemetery company there was no separable part of its income which was capable of being represented as rental. Lord McLaren, however, pointed out that the enumeration in this rule also included "words of a description in which it seems "quite possible to make such a separation into income "assessable under Schedule A a. income assessable "under Schedule D"—instancing gasworks as a case in which "it would not be so difficult to separate rent "from commercial profit, and for other purposes "such a separation has been made." Lord McLaren also stated that: "It is certainly not sufficient to "bring a particular use of land within the scope of "Rule III that the proprietor of the land is using it "in connection with his trade or for purposes of trade "because in such cases it is generally possible to "separate the income into two parts, the one repre-"senting the rent or annual value of the heritable "property and the other representing the commercial "profit." In referring to this Cemeteries case (1), in

(1) 2 Tax Cases 516, 27 S.L.R. 71.

C.A. 1944.

RUSSELL (INSPECTOR OF TAXES), Appellant v. SCOTT, Respondent

MURPHY, L.J.

Fry v. Salisbury House Estate Ltd. (1), Lord Dunedin at page 445, and Lord Macmillan at page 469, quoted this part of Lord McLaren's judgment, in which, as Lord Dunedin said, Lord McLaren "seems almost to "anticipate the present case"—that is to say a case distinguishable from the Cemeteries case (2). Both these learned Lords recognize the decision in the Cemeteries case (2), but it was not necessary for them to do more than to distinguish it. For my own part I find it difficult to understand why Lord Shand in the Cemeteries case (2) should have been apparently, impressed by the consideration that "all these different "concerns" (in Rule III, 3) "relate to *companies* . . ." If there is any materiality in this consideration, it does not apply to the present case; and again I can see no difficulty in distinguishing between "rental" and "commercial profit" in the case of a sand-pit. While therefore the Cemeteries case (2) is an authority for the "startling" proposition that a cemetery, owned and managed as was this Edinburgh cemetery, is a "concern of the like nature" with those enumerated in Rule III, 3, I do not think that it would compel me to hold that this sand-pit as "managed" and worked—if a "concern"—is also a "concern of the "like nature." The words of Blackburn, J., in *Reg. v. Cleworth* (3), seem to be apposite where, on the question as to the application of the words "or other "person whatsoever" under the Lord's Day Observance Act, 29 Car. II, c. 7, s. 1, to a farmer, he said (at p. 934): "The ratio of the decision in *Sandiman v. Breach* (4) is, "that where it appears that the class which it is sought "to bring within the Act was known to the Legislature "at the time the Act was passed, and that class is "omitted, it must be supposed to have been omitted "intentionally. It is impossible to suppose that "so numerous and extensive a class as farmers would "be referred to under general words, if it was meant "to be included."

(1) [1930] A.C. 432.
(2) 2 Tax Cases 516, 27 S.L.R. 71.
(3) 4 B. & S. 927, 122 E.R. 707.
(4) 7 B. & C. 96, 108 E.R. 661.

By the use of the words " of the like nature " it is clear that the Legislature intended that the general words " other concerns " should have a limited interpretation, and Lord McLaren's judgment in the *Cemeteries case* (1) seems to me to negative the existence of any " genus " to which the several concerns enumerated in Rule III (3) could be said to belong.

We have not been asked to decide any question save the application of Rule III (3) to this sand-pit, and in deciding, on such facts as are before us, that this Rule does not so apply, I wish to make it clear that I have not considered the applicability of any other Rule or Schedule.

Solicitor for the appellant: *F. C. MacNeice*, Solicitor to the Ministry of Finance.

Solicitor for the respondent: *W. J. G. Seeds.*

J. McC.

(1) 2 Tax Cases 516, 27 S.L.R. 71.

C.A.
1943.

Nov. 4, 15.
Dec. 13.
1944.
Feb. 1, 8.

CULLEN v. DALE.

CULLEN v. BRACEWELL.

Gaming and wagering—Automatic machines for the purpose of gaming—Gaming Act, 1845, *secs.* 3, 4, 8—*Gaming Houses Act*, 1854, *sec.* 4—*Power of Justice of the Peace to issue search warrant—"Other instruments of gaming"—No notice of application for order for destruction of automatic gaming machines—Jurisdiction to grant such order.*

The defendants each carried on an amusement business in premises open to the public and containing a number of automatic "penny in the slot" machines which members of the public resorting to the premises used for playing games of chance. The premises were each searched by the police under warrants issued under the Gaming Act, 1845, by a Justice of the Peace, who took depositions at a Special Court and remanded the defendants on bail to attend the Petty Sessions Court. The defendants were each charged with: (1) unlawfully keeping a common gaming house contrary to the Gaming Act, 1845, no summons having been issued in respect of this charge, and (2) using the premises for unlawful gaming contrary to the Gaming Houses Act, 1854, section 4.

At Petty Sessions the defendants were each convicted on both charges and fined and it was ordered that the automatic machines be destroyed. On appeal to Quarter Sessions the convictions and penalties and the orders for the destruction of the automatic machines were affirmed.

On Cases Stated by the County Court Judge.

Held, by the Court of Appeal (Babington and Murphy, L.JJ.):—

(1) A Justice of the Peace has jurisdiction to issue a warrant under the Gaming Act, 1845, section 3, because he has by law "authority "to enter any house . . . where unlawful games shall be suspected "to be holden" by virtue of the Irish Statute, 13 Geo. II, c. 8, and the Gaming Act, 1802 (42 Geo. III, c. 119).

(2) Automatic machines for the purpose of playing games of chance and used for that purpose are instruments of gaming within the meaning of the Gaming Act, 1845, section 8, and as the defendants were each represented by counsel at Petty Sessions the orders for the destruction of the machines were valid, notwithstanding that no notice was given to either defendant of any intended application for such an order.

(3) The convictions against the defendants under the Gaming Houses Act, 1854, section 4, should be quashed as being for substantially the same offences as those charged under the Gaming Act, 1845.

The defendants each carried on an amusement business in premises open to the public and containing a number of automatic "penny in the slot" machines for the purpose of playing games of chance and used for that purpose. The police entered the premises of the defendants under warrants issued by a Justice of the Peace and arrested the defendants and seized a number of the automatic machines. The defendants, at the time of arrest, were each charged with keeping a common gaming house contrary to the Gaming Act, 1845; no summons was at any time issued in respect of these charges. After the arrest depositions were taken in each case by the Justice of the Peace who had issued the warrants and the defendants were remanded on bail to attend the court of petty sessions. The defendants were each also summoned for using their premises at the same time for the purpose of unlawful gaming contrary to the Gaming Houses Act, 1854, section 4. The Resident Magistrate who heard the cases at Petty Sessions convicted each of the defendants and imposed a fine in respect of each charge and ordered that the machines seized should be destroyed.

On appeal to the court of Quarter Sessions the County Court Judge affirmed the judgment of the Resident Magistrate in each of the cases; and in each of the cases stated a Case, pursuant to the Summary Jurisdiction and Criminal Justice Act (Northern Ireland) 1935, section 26, for the opinion of the Supreme Court on the following points of law:—

(1) Whether the convictions and the directions for destruction of the automatic machines were made without jurisdiction, the warrants of search and arrest having been issued by a Justice who had not by law authority to enter any house or place where unlawful games might be suspected to be holden.

(2) Whether the convictions and directions for the destruction of the automatic machines were made without jurisdiction, the Justice who issued the warrants of search and arrest being without jurisdiction to do so or to adjudicate in the proceedings.

C.A. 1943.

CULLEN v. DALE. CULLEN v. BRACEWELL.

(3) Whether the convictions and directions for destruction were made without jurisdiction the same not having been made by a Justice having jurisdiction before whom the defendant was first brought by virtue of the warrants.

(4) Whether the automatic machines directed to be destroyed were subject matters for such destruction, not being within the scope and intendment of the Gaming Act, 1845.

(5) Whether the directions for the destruction of the automatic machines were made without jurisdiction no summons and no notice of application for same having been served on or given to the defendants before the hearing at Petty Sessions.

(6) Whether the conviction or acquittal of a defendant on a charge of unlawfully keeping a common gaming house contrary to the Gaming Act, 1845, is a defence to a charge of using the same premises at the same time for the purpose of unlawful gaming being carried on therein contrary to the Gaming Houses Act, 1854, section 4.

The cases were heard together.

Campbell, K.C., and *Lamb* for the defendants and appellants :—

The warrants of search and arrest were made without jurisdiction having been issued by a justice who had not by law as required by section 3 of the Act of 1845 power to enter a house or place where unlawful games might be suspected to be holden. A justice within the realm of England had such power under the statute 33 Hen. VIII, c. 9. but that statute did not extend to the realm of Ireland. England and Ireland were then two realms with two Parliaments. The Gaming Act, 1802, and the Lotteries Act, 1823, which relate to keeping places for lotteries, gave power to justices to issue warrants to enter such places. No Act says that places for lotteries are common gaming houses. Keeping a place for a lottery is not keeping a common

gaming house. By section 2 of the Act of 1853 betting houses are deemed common gaming houses. Section 3 of the Act of 1845 gave power to English justices of the peace to issue warrants to enter common gaming houses. An authority to a justice to enter a house must be given expressly by statute.

The warrant *ab initio* being void neither the justice at the original hearing nor the resident magistrate at petty sessions had jurisdiction.

The automatic machines were undreamt of in 1845 and were not "instruments of gaming" within section 8 of the Gaming Act, 1845, not being *ejusdem generis* with "cards, dice, balls, counters, tables." No order for the destruction of these machines should be made because the defendants had not been given any notice by summons or otherwise of any application for such order: *Ex parte Francis* (1), *Quinn v. Pratt* (2), *Craig v. Kanssen* (3).

The offences of keeping a common gaming house contrary to the Act of 1845 were substantially the same as those of using the premises for unlawful gaming contrary to the Act of 1854. Section 33 of the Interpretation Act, 1889, says that where an Act constitutes an offence under two or more statutes an offender cannot be punished twice for the same offence. The convictions under the former Act are a bar to proceedings under the second Act: *Dorrian v. McHugh* (4).

Fox, K.C., and *Phelan* for the complainant and respondent:—

In *Munro v. Kelly* (5) a place where a lottery was kept was held to be a common gaming house. In that case no comment was made on the issue of the warrant by a justice of the peace under the Gaming Act, 1845. An automatic machine which was an instrument of chance was held to be a lottery: *Santongeli v. Neilson* (6).

(1) [1903] 1 K.B. 275.
(2) [1908] 2 I.R. 69.
(3) [1943] 1 K.B. 256.
(4) [1907] 2 I.R. 564.
(5) 45 I.L.T.R. 179.
(6) [1901] S.C. 10.

C.A. 1943.

CULLEN v. DALE. CULLEN v. BRACEWELL.

In Ireland a justice of the peace has power to enter a place where unlawful games are suspected to be held by virtue of an Irish Act of 1739, 13 Geo. II, c. 8, entitled: "An Act for the more effectual preventing "of excessive and deceitful Gaming." This Act provides for the conviction "upon the view of such "justice" of any persons setting up offices or places for lotteries or other devices determining chances. Similar words are used in the (English) Gaming Act, 1738. The Irish Act of 1739 and the Gaming Act, 1802, gave to Irish justices of the peace the same power to enter such places as the power given to English justices by the Act of 1541 and the Unlawful Games Act, 1728.

Automatic machines used for gaming are "instru- "ments of gaming" within the Gaming Act, 1845, section 8. The power of a magistrate under section 8 to direct all such instruments of gaming to be destroyed is a penal consequence of a conviction under the Act, and no notice by summons or otherwise is required: *Rex* (*Lockhart*) *v. McKenna* (1).

The facts in the charges of using the premises for the purpose of unlawful gaming and, in *Dale's case*, of keeping a betting house constitute different offences from the facts in the charges of keeping a common gaming house. Otherwise there should be only one conviction for the same offence.

Campbell, K.C. (in reply):—

The Irish statute of 13 Geo. II, c. 8, which is aimed at the sale of houses, ships, etc., by lotteries gives power to a justice to commit "upon the view" but from this singular jurisdiction a power of entry cannot reasonably be implied.

Cur. adv. vult.

The judgment of the Court was delivered by Murphy, L.J., as follows:—

MURPHY, L.J.

MURPHY, L.J.: It was agreed that these two cases should be heard together, the only material difference

(1) [1933] N.I. 21.

between them being that the charges under the Betting Acts in the case of *Cullen v. Dale* do not appear in *Bracewell's case.*

The facts, on which interesting legal arguments have been addressed to us, need not be recapitulated ; they are set out in the Cases Stated and the reply of the learned County Court Judge to the question submitted to him by the Court.

The first question is the most important as it is the most difficult of all the questions discussed before us. Mr. Campbell contends that Mr. H. Cullen, the County Down Justice of the Peace, who issued warrants under which the Police entered these premises, had no jurisdiction to issue a warrant under section 3 of the Gaming Act, 1845 (8 & 9 Vict., c. 109), as in an Irish County a Justice of the Peace had no "authority by "law to enter into any house, room or place where "unlawful games shall be suspected to be holden." He has pointed out that the Statute, 33 Henry 8, c. 9, had no application to Ireland. By Section 9 of that Statute "all and everie the Justices of peace in everie "shier" were authorised "to come enter and resorte "into all and everie houses places and allies where "suche games shall be suspected to be houlden used "exercised or occupied," and to arrest the keepers and parties playing and take security for their good behaviour. It is this Statute (33 Henry VIII, c. 9) which is, in part, repealed by the Gaming Act of 1845, and it is clear that the draftsman of Section 3 of the later Statute, had in mind section 9 of the earlier statute, while we doubt if he adverted to the difference (if any) between the statutory powers of Justices of the Peace in Ireland from those in England, although the Gaming Act, 1845, not merely applied to Ireland, but contains a special adaptation section (24). The question for us is : Had a Justice of the Peace in an Irish County in 1845 "by law authority to enter into "any house . . . where unlawful games shall be "suspected to be holden"? The use of the word "shire" in section 3 does not, in our opinion, constitute any difficulty in applying the words of the section to Ireland—33 Henry VIII, c. 1 (Irish) (by

C.A. 1943.

CULLEN v. DALE.

CULLEN v. BRACEWELL.

MURPHY, L.J.

which Statute Henry VIII his heirs and successors Kings of England were declared to be always Kings of Ireland) provided that "proclamation shall be made "in all shires. . . ."

The earlier Irish Statutes 10 Will. III, c. 11, 6 Anne, c. 17 and 11 Anne, c. 6, do not confer any power of entry on Justices of the Peace, but 13 Geo. II, c. 8 (which is aimed against keeping "any office or place" for lotteries) provides for the conviction of offenders "before any one justice of the peace for any county," "upon the oath or oaths of one or more credible "witness or witnesses," "or upon the view of such "Justice or Justices," and we do not think that effect can be given to these latter words if the Justices had not power to enter such premises *in invitum* the proprietor. Mr. Fox has referred us to similar words in the (English) Gaming Act of 1738, 12 George II, c. 28. The Statute 42 George III, c. 119 (which applies to Ireland) is directed against keeping "any office or "place" for "any game or lottery called a little goe "or any other lottery whatsoever not authorised by "Parliament," and by section 4 provides that "upon "complaint or information made upon oath before "any justice or justices of the peace," the Justice may issue a special warrant to authorize "any person "or persons by day or by night (but if in the night "time, then in the presence of a constable or other "lawful officer of the peace who are hereby required "to be aiding or assisting therein) to break open the "doors or any part of such house or place where such "offence shall have been committed and to enter "into such house or place, and to seize and apprehend "all such offenders. ." A similar power to issue special warrants conferring a like authority is to be found in section 59 of the Suppression of Lotteries Act, 1823, 4 George IV, c. 60, an act directed against "lottery insurers and persons selling tickets for un- "authorized lotteries," and which also applies to Ireland.

We are of opinion that Mr. Fox is correct in his argument that, impliedly under 13 George II, c. 8, and explicitly under 42 George III, c. 119, at the time

of the passing of the Gaming Act, 1845, Justices of the Peace in the Irish Counties *had* by law authority to enter these houses where the defendants kept these penny-in-the-slot automatic machines, and that, accordingly, Mr. H. Cullen *had* jurisdiction to issue the warrants which have been objected to.

This question is involved in points (1), (2) and (3) of the Case Stated, and in addition Mr. Campbell has argued that under the Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935, Mr. Cullen, the Justice of the Peace, had no power to "adjudicate" in these cases.

The answer to this is, we think, reasonably clear. Section 3 (2) (*b*) preserved the power of a Justice of the Peace "to sign summonses and warrants" and 3 (2) (*h*) enables a Justice of the Peace to "take evidence "against any person charged with an indictable "offence." There can be no doubt, see section 4 of the Gaming Act, 1845, that the owner or keeper or other person having the care or management of a common gaming house could be proceeded against by indictment (a common gaming house being a common law nuisance) and, therefore, Mr. Cullen, before whom the defendants in these two cases were brought, had power to "take evidence" against them, and the fact that the cases were later dealt with summarily by the Resident Magistrate could not affect this power. If, as we hold, Mr. Cullen had jurisdiction to "take "evidence" he had inherent jurisdiction to remand, and such power is, again, preserved by sections 3 (2) (*h*) and 3 (3) of the Act of 1935. Mr. Cullen did not "adjudicate" in the cases.

By section 7 (1) of the Act of 1935 a Resident Magistrate may now exercise alone any jurisdiction which formerly could only be exercised by two Justices of the Peace, and therefore could impose the penalties prescribed by section 4 of the Gaming Act, 1845, while, as under section 3 of that Act persons brought before a Justice of the Peace under warrant are to be "dealt "with according to law" and the Resident Magistrate was the first person who could so deal with the defendants, he was, in our opinion, the Justice before

C.A. 1943.

CULLEN v. DALE. CULLEN v. BRACEWELL.

MURPHY, L.J.

whom these defendants were taken by virtue of the warrants, within the wording of section 8, and accordingly (subject to another contention of Mr. Campbell) he could make an order for destruction under that section. This leads to a consideration of Mr. Campbell's contention that the automatic machines mentioned in the Cases were not "instruments of "gaming" within section 8 of the Gaming Act, 1845. He submits that the *ejusdem generis* principle of construction should be applied to the words " other "instruments of gaming," but in our opinion this could not assist his arguments. If any "genus" could be found which would include " cards dice balls " counters tables " it would be a class (or genus) of things with which or on which any unlawful game is or can be played. If this be the genus, these automatic machines, which have been found by the learned County Court Judge to be games of chance and as being used for the purpose of gaming, are clearly "other instruments of gaming." We have been referred to numerous authorities—it is sufficient to quote *Fielding v. Turner* (1), and *Rex v. Tompson* (2); it is not contested that the question whether or not play on these automatic machines constituted unlawful gaming was a question of fact, and that on the facts the finding of the County Court Judge could not be disturbed. We are, therefore, of opinion that these " points " numbered 1, 2, 3 and 4 were correctly dealt with by the learned County Court Judge who rejected the several submissions.

On point 5 Mr. Campbell referred us to *White v. Redfern* (3), *Quinn v. Pratt* (4), *Ex parte Francis & Ors.* (5), and *Craig v. Kaussen* (6), and argued that no direction for destruction of the machines should have been made because no notice by summons or otherwise was given to the defendants of any intended application for such an order. He distinguishes *White v. Redfern* (3) and relies on the words of Field, J., at p. 18: "The legislature generally cannot be con-

(1) [1903] 1 K.B. 867.
(2) [1943] K.B. 650.
(3) 5 Q.B.D. 15.
(4) [1908] 2 I.R. 69.
(5) [1903] 1 K.B. 275.
(6) [1943] K.B. 256.

"sidered to have intended that a man's property may "be destroyed without giving him an opportunity of "being heard, but here the paramount object would "appear to be the speedy destruction of a noisome "and unwholesome thing." In *Ex parte Francis* (1) all that was decided was that an order for the destruction of music said to be "pirated" should *not* be made *ex parte*; *Quinn v. Pratt* (2) was a case in which an order for delivery of barley alleged to have been stolen was made under the Police Property Act (60 & 61 Vic., c. 30, s. 1) by two Justices sitting in the day room of a police barrack although the persons interested ere not present and had not been summoned to attend, while in *Craig v. Kanssen* (3), an order was made under the Courts (Emergency Powers) Act although—contrary to a statement in an affidavit—the summons had *not* been served on the defendant. These three cases certainly establish as a general principle that an order for the destruction or confiscation of a man's property should not be made without giving the person affected an opportunity of being heard. In the present case, however, the persons affected were represented by counsel before the Resident Magistrate who heard the charges under the Gaming Act, 1845, and obviously had to determine and did determine the questions arising under sections 2, 4 and 8 before he made the orders for destruction. No application was made for an adjournment on behalf of either defendant—we cannot appreciate the reason alleged for the failure to make such an application if the defendants' counsel considered that their clients could have thereby been enabled to make a more effective resistance to the orders for destruction, it must have been obvious from the start that if the charge of keeping a common gaming house were established an order for the destruction of these machines would certainly, or almost certainly, be made. It is agreed that at some stage of the hearing *Ex parte Francis* (1) was cited to the Resident Magistrate. We are of opinion that "point" number 5 is unsustainable.

(1) [1903] 1 K.B. 275.
(2) [1908] 2 I.R. 69.
(3) [1943] K.B. 256.

C.A. 1943.

CULLEN v. DALE. CULLEN v. BRACEWELL.

MURPHY, L.J.

As to point 6. The preamble to the Gaming Act, 1845, renders it clear that one object of the Statute was to make effective the existing laws against unlawful gaming, and again the Statute of 1854 (The Gaming Houses Act, 1854, 17 & 18 Vic., c. 38) by its preamble states that "it is expedient that the law should be "made more efficient for the suppression of gaming "houses." By its first three sections this later Statute provided for cases where the entry of constables into such premises was obstructed, and where persons found therein gave false names and addresses. Section 4 provided increased penalties (the maxima are raised to £500 and 12 months imprisonment) and while section 4 of the Act of 1845 was limited in its operation to (*a*) the owner or keeper of any common gaming house, (*b*) every person having the care or management thereof, (*c*) every banker, croupier and other person who shall act in any manner in conducting the business of any common gaming house; section 4 of the Act of 1854 provides for the increased penalties on (*a*) any person being the owner or occupier or having the use of any house room or place who shall open keep or use the same for the purpose of unlawful gaming, (*b*) any person who being the owner or occupier of any house or room shall knowingly and wilfully permit the same to be opened kept or used by any other person for the purpose aforesaid, (*c*) any person having the care or management of or in any manner assisting in conducting the business of any house (etc.) opened kept or used for the purpose aforesaid, (*d*) any person who shall advance or furnish money for the purpose of gaming with persons frequenting such house (etc.).

Both sections are, therefore, directed against the same offence, i.e., the keeping or using premises as a common gaming house, but section 4 of the Act of 1854 extends to persons who could not be convicted under the more limited wording of section 4 of the Act of 1845.

In the present cases, the facts on which the charges under the Gaming Houses Act, 1854, were based were identical with those relating to the charges under the Gaming Act, 1845, and the words of Andrews, J., in

Dorrian v. McHugh (1), appear to us to be precisely applicable : " In substance and reality there was only " one offence, and by the second conviction and the " sentence thereon he was punished a second time for " what in this case was in substance the same offence " and the second conviction ought to be quashed."

The same principle is illustrated by *Wemyss v. Hopkins* (2), and we desire to refer to the words of Blackburn, J., at p. 381 : " The defence does not arise " on a plea of *autrefois* convict, but on the well- " established rule at common law, that when a person " has been convicted and punished by a Court of " competent jurisdiction, *transit in rem judicatam.* " That is, the conviction shall be a bar to all further " proceedings for the same offence and he shall not be " punished again for the same matter, otherwise there " might be two different punishments for the same " offence." In the same case Lush, J., says (at page 382) : " I am also of opinion that the second conviction " should be quashed, upon the ground that it violated a " fundamental principle of law, that no person should " be prosecuted twice for the same offence." We are therefore of opinion that the convictions on charges of using the premises for unlawful gaming contrary to the Gaming Houses Act, 1854, section 4, should be quashed as being for substantially the same offences as those comprised in charges of unlawfully keeping a common gaming house contrary to the Gaming Act, 1845.

Having regard to the reply of the learned County Court Judge to the query submitted to him by us, Mr. Fox, when these Appeals were again listed for the purpose of being spoken to on the reply of the County Court Judge, informed us that as there were no special facts which would constitute betting offences there should not be convictions on the charges under Betting Acts, 1853 and 1874, and accordingly we are not required to express any opinion on these charges and, on consent, these convictions on the charges under the Betting Acts, 1853 and 1874, should also be quashed. We therefore agree with the learned County Court

(1) [1907] 2 I.R. 564, p. 573. (2) L.R. 10 Q.B. 378.

C.A. 1943.

CULLEN v. DALE. CULLEN v. BRACEWELL.

MURPHY, L.J.

Judge in rejecting the arguments on behalf of the defendants on the points numbered 1 to 5 in both Cases Stated. The convictions in *Dale's case* on the charges of using a place for the purpose of unlawful gaming and on the charges under the Betting Acts, 1853 and 1874, and in *Bracewell's case* on the charges of using a place for the purpose of unlawful gaming, will be quashed. We express no opinion on the "point" in *Dale's case* whether the direction to destroy two fruit machines taken from the back of his premises and the direction in *Bracewell's case* to destroy certain machines taken from the back of his premises, were made without jurisdiction, the said instruments not having been used for the playing of any game, no argument having been addressed to us on either of these points.

Both the complainant and the defendants will abide their own costs of the hearing before us.

Solicitor for the complainant and respondent : *Chief Crown Solicitor.*

Solicitor for the defendants and appellants : *Bernard Campbell.*

M.V.P.

C.A.
1944.

Jan. 31.
Feb. 2.
May 4.

FIRMAN v. MALOCCA.

Dealing with prohibited goods—Proceedings for recovery of penalty—Dismiss at Petty Sessions—Appeal to Quarter Sessions—"Criminal cause or matter"—Customs Consolidation Act, 1876 (39 & 40 *Vict.*, *c.* 36,) *s.* 186—*Customs and Inland Revenue Act*, 1879 (42 & 43 *Vict.*, *c.* 21), *ss.* 11, 12—*Finance Act*, 1935 (25 & 26 *Geo.* 5, *c.* 24), *s.* 15—*Import, Export and Customs Powers (Defence) Act*, 1939 (2 & 3 *Geo.* 6, *c.* 69), *s.* 3 (1)—*Export of Goods (Control) (No.* 19) *Order*, 1941.

An information was laid against the defendant charging him with being knowingly concerned in dealing with certain goods with intent to evade the prohibitions applicable thereto contrary to section 186 of the Customs Consolidation Act, 1876, and to the Export of Goods (Control) (No. 19) Order, 1941, whereby he incurred penalties and the goods were forfeited under the Import, Export and Customs Powers (Defence) Act, 1939, sec. 3 (1).

The summons was dismissed at Petty Sessions. On appeal by the complainant to Quarter Sessions, the County Court Judge held that such appeal lay, he held that the charges were proved, and imposed penalties with an alternative of imprisonment.

On a Case Stated as to whether an appeal lay to Quarter Sessions against the order made at Petty Sessions.

Held, by the Court of Appeal (Andrews, L.C.J., Babington and Murphy, L.JJ.), that the proceedings did not constitute a criminal cause or matter, and that an appeal lay to Quarter Sessions.

CASE STATED by the County Court Judge and Chairman of Quarter Sessions of the County of Down pursuant to the Summary Jurisdiction (Northern Ireland) Act, 1935.

The defendant was charged at Petty Sessions with being knowingly concerned in dealing with certain goods with intent to evade the prohibition applicable thereto, contrary to section 186 of the Customs Consolidation Act, 1876, and to the Export of Goods (Control) (No. 19) Order, 1941, whereby the defendant incurred a penalty of £100 and the goods were forfeited under section 3 (1) of the Import, Export and Customs Powers (Defence) Act, 1939, and for which penalties the Commissioners of Customs and Excise elected to sue. The summons was dismissed.

C.A. 1944.

FIRMAN v. MALOCCA.

The complainant appealed to Quarter Sessions. The County Court Judge held that an appeal to Quarter Sessions lay against the order made at Petty Sessions. He found the charges proved and imposed penalties, with an alternative of imprisonment. He stated a case for the opinion of the Supreme Court on the question whether an appeal lay to Quarter Sessions against the order made at Petty Sessions.

Warnock, K.C., and *Hanna*, for the defendants :— It is contended that the *King* (*Sherry*) *v. County Court Judge of Fermanagh* (1), governs this case. But the ground for the decision in that case has been taken away by the Finance Act, 1935, sec. 15, by virtue of which the Resident Magistrate if he had convicted the defendant of the offences charged, could have ordered them to be imprisoned in lieu of ordering them to pay penalties. In Scotland the Summary Procedure (Scotland) Act, 1864, sec. 18, enacts that such proceedings "shall be deemed and taken to be of a "criminal nature."

MacDermott, A.G., *Fox, K.C.*, and *Phelan*, for the complainant :—

The decision of this Court in *The King* (*Sherry*) *v. County Court Judge of Fermanagh* (1), rules this case. The provisions of section 15 of the Finance Act, 1935, do not add any fresh element for consideration as by section 12 of the Customs and Inland Revenue Act, 1879, imprisonment can be imposed for a subsequent offence "in lieu of payment of the penalty."

Regulation 76B of the Defence (General) Regulations enables certain export offences to be dealt with on indictment as offences against that regulation but these proceedings are not brought under that regulation and are independent of it.

Admittedly export offences in time of war are offences against the community and the relevant prohibitions go further than the protection of H. M. Revenues. But the Legislature has seen fit to graft the enactments providing for the suppression of such

(1) [1935] N.I. 211.

offences upon the law relating to Customs offences and it is submitted that in consequence all Customs offences whether relating to import or export are of the same nature. In *Barnard v. Gorman* (1), there are indications in the speeches of Lord Simon (p. 387), and of Lord Wright (p. 391), that an offence under s. 186 was regarded as criminal. But these dicta are *obiter*. The point did not arise and does not appear to have been discussed.

Cur. adv. vult.

BABINGTON, L.J.

The judgment of the Court was delivered by BABINGTON, L.J., as follows :—

The question submitted for our opinion by the County Court Judge arises upon an information laid by the complainant, one of His Majesty's Officers of Customs and Excise, against the defendant, Benedict Malocca, charging him with being knowingly concerned in dealing with certain prohibited goods contrary to Section 186 of the Customs Consolidation Act, 1876, and to the Export of Goods (Control) (No. 19) Order, 1941.

The Summons based on the information came before Major McCallum, R.M., who dismissed it, and from this order an appeal was taken to the County Court Judge by the Officer of Customs and Excise. At the hearing before the County Court Judge the preliminary point was taken that no appeal lay from the order of the Resident Magistrate on the ground that it was made in a criminal cause or matter, and having adjourned the appeal for argument, he finally overruled the objection and held that he had jurisdiction to entertain the appeal. He then found the charge duly proved and imposed a penalty of £10 with an alternative of two months imprisonment on the defendant, but stated a Case for the opinion of this Court.

The Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935, which replaces Section 24 of the Petty Sessions (Ireland) Act, 1851, provides that " An appeal shall lie to a court of quarter sessions

(1) [1941] A.C. 378.

C.A. 1944.

FIRMAN v. MALOCCA.

BABINGTON, L.J.

"against an order of a court of summary jurisdiction "in *cases of a civil nature* by either party whether he is "complainant or defendant—and in other cases by "any party against whom an order is made for pay- "ment of any penal or other sum" and the right of the complainant to appeal was conceded if this be a case of a civil nature.

The answer to this question depends on the nature of the offence and of the proceedings prescribed by Statute in Revenue cases. The summons, which recites the information on which it was based, charges the defendant with being knowingly concerned in dealing with certain prohibited goods with intent to evade the prohibition applicable thereto contrary to Section 186 of the Customs Consolidation Act, 1876, and to the Export of Goods (Control) (No. 19) Order, 1941, whereby he incurred a penalty of one hundred pounds and the goods are forfeited under Section 3 (1) of the Import, Export and Customs Powers (Defence) Act, 1939, and for which penalty the Commissioners of Customs and Excise have elected to sue. This Act is an emergency statute and Section 3 (1) provides for an additional Customs penalty of £500.

The penalty prescribed by Section 186 for a variety of offences set out in the section, of which that charged is one, is forfeiture of either treble the value of the goods including the duty payable thereon or one hundred pounds at the election of the Commissioners of Customs, and the offender may either be detained or proceeded against by summons, and by Section 232 "If any penalty incurred for any offence under the "Customs Acts be not paid on conviction the con- "victing justice shall forthwith commit the offender "to any of Her Majesty's Gaols within his jurisdiction "there to remain for such term as is hereinafter "provided or until the penalty shall be paid."

By Section 12 of the Customs and Inland Revenue Act, 1879 (42 & 43 Vict., c. 21) when the penalty imposed is one hundred pounds or upwards the justice may commit the offender for not less than six nor more than nine months in default of payment, and if for a subsequent offence may order that in lieu of payment

of the penalty he be imprisoned with or without hard labour for a period not less than six nor more than twelve months.

Section 11 of The Customs and Inland Revenue Act, 1879 (42 & 43 Vic., c. 21) provides how duties, penalties and forfeitures are to be sued for: "All duties penalties "and forfeitures incurred under or imposed by the "Customs Acts and the liability to forfeiture of any "goods seized under the authority thereof may be "sued for, prosecuted, determined and recovered by ". . . action of debt, information or other appropriate "proceeding . . . in the superior Courts of Common "Law at Dublin . . . in the name of the Attorney-"General for Ireland . . . or of some officer of Customs "or Excise or by information in the name of some "officer of Customs or Excise before one or more "Justice or Justices in the United Kingdom."

In Northern Ireland this jurisdiction is exercised by the High Court and the judicial functions of the Justices have been transferred to the Resident Magistrate under the Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935.

Since the decision of *The King (Sherry) v. The County Court Judge and Chairman of Quarter Sessions for County Fermanagh* (1), a further penalty has been added to those which can be imposed in Customs cases by section 15 of the Finance Act, 1935 (25 & 26 Geo. 5, c. 24) which provides that "Where a person is con-"victed of an offence under section one hundred "and eighty-six of the Customs Consolidation Act, "1876 (which relates to evasions of duties of customs "and of the laws and restrictions of the customs "relating to the importation unshipping landing and "delivery of goods) the Court may if it thinks fit *in lieu* "of ordering him to pay a penalty order him to be "imprisoned for a term not exceeding two years."

As the law stood before this Act was passed *Sherry's case* was a clear decision by this Court that proceedings taken by an officer of Customs under section 186 of the Customs Consolidation Act, 1876, and section 11 of the Customs and Inland Revenue Act, 1879, are of a

(1) [1935] N.I. 211.

C.A. 1944.

FIRMAN v. MALOCCA.

BABINGTON, L.J.

civil nature and that both complainant and defendant have a right of appeal under section 24 (1) of the Summary Jurisdiction Act, 1935. The present case and *Sherry's case* were brought under the same section and are similar in all respects upon the facts, so that unless the Finance Act, 1935, has altered the nature of the offence and of the proceedings taken under section 186 of the Customs Consolidation Act, 1876, we are bound by the decision in *Sherry's case* and must give effect to it.

Mr. Warnock challenged the decision in *Sherry's case* and maintained: (1) that it violated a well-established principle of our law that a citizen having been acquitted on a criminal charge cannot be placed in peril a second time for the same offence, and (2) that even if that case was rightly decided subsequent decisions have in effect overruled it, and (3) that section 15 of the Finance Act, 1935, has taken all Revenue cases out of the class comprised in "Cases of a civil nature" and transferred them to the class "Criminal causes "or matters." The first branch of this argument begs the question which we have to decide by assuming that proceedings under section 186 are of a criminal nature and none of the authorities cited in support of Mr. Warnock's second point deal with Revenue cases or the authorities on which the decision in *Sherry's case* was based or with *Sherry's case* itself which decided that Revenue cases are not within the general rule by which the criminality or non-criminality of a charge must be tested. This general rule as stated by Lord Cave in *Clifford and O'Sullivan* (1), at page 580, was pressed on us as being both exclusive and exhaustive and as prescribing two tests within which every case can be brought, namely, that a charge is criminal if it involves the consideration of some charge of crime, that is to say, of an offence against the public law, and is preferred or about to be preferred before some Court or judicial tribunal having or claiming jurisdiction to impose punishment for the offence or alleged offence.

The question has arisen on many occasions under

(1) [1921] 2 A.C. 570.

section 50 of the Judicature Act (Ireland), 1877, which provides that no appeal shall lie from any judgment of the High Court in any criminal cause or matter and these words have been given the widest possible interpretation, *Exparte Alice Woodhall* (1), and in *Seaman v. Burley* (2). Lord Esher says at p. 347 that when the proceeding is before magistrates and it is one which may end in imprisonment it must be considered to be a criminal proceeding. The cases go very far and in *Mellor v. Denham* (3), an information for contravening the byelaws of a School Board by neglecting to send a child to school, for which offence the penalty was a fine of five shillings, was held to be a criminal offence ; and *The Queen v. Whitchurch* (4) nuisance, and *The Queen v. Sullivan* (5), a prosecution for having kept a dog without a licence thereby incurring a penalty not exceeding 40*s.* 0*d.*, are further examples of this rule—which is summarised by Lord Wright in *Amand v. Home Secretary and Minister of Defence of Royal Netherlands Government* (6), at p. 162, where he says : " The principle which I deduce from the " authorities I have cited and the other relevant " authorities which I have considered is that if the " cause or matter is one which, if carried to its con- " clusion, might result in the conviction of the person " charged and in a sentence of some punishment such " as imprisonment or fine it is ' a criminal cause or " ' matter.' The person charged is thus put in " jeopardy."

This line of authorities is clear but it is to be noticed that none of them deals with Revenue informations, which are not referred to in any of the judgments, and *Amand's case* merely re-affirms the law in cases outside the Revenue Code which, save for the provision next referred to, is the same now as it was when *Sherry's case* was decided, and in none of them is the decision in *Sherry's case* and the authorities on which it is based considered or even referred to. So far as authority goes *Sherry's case* therefore stands unimpugned.

(1) 20 Q.B.D. 832.
(2) [1896] 2 Q.B. 344.
(3) 5 Q.B.D. 467.
(4) 7 Q.B.D. 534.
(5) I.R. 8 C.L. 404.
(6) [1943] A.C. 147.

C.A. 1944.

FIRMAN v. MALOCCA.

BABINGTON, L.J.

Sherry's case was decided in January, 1935, and in July, 1935, section 15 of the Finance Act of that year amended the penalty under section 186 of the Customs Consolidation Act, 1876, enabling the Court to order a person convicted of an offence under that section in lieu of paying a penalty to be imprisoned for a term not exceeding two years.

This was a drastic amendment of the Revenue laws, and at first sight it would certainly appear to make all offences charged under section 186 after the passing of the 1935 Act criminal offences, and we have to determine whether this statute, which prescribes imprisonment as an alternative primary sanction in these cases has altered the law and made obsolete the decision in *Sherry's case* and the authorities on which it is based.

To understand the line of authorities which culminated in *Sherry's case* it is necessary to look at the Statutes which govern smuggling cases. It is not necessary to go further back than the Smuggling Prevention Act, 1845 (8 & 9 Vic., c. 87). This was a consolidating Act and section 46 provided that persons guilty of knowingly unshipping harbouring or having the custody of any prohibited or uncustomed goods should forfeit either treble the value thereof or the penalty of one hundred pounds at the election of the Commissioners of Customs.

Section 82 provided that all penalties and forfeitures under the Act should be sued for and recovered by Action of Debt, Bill, Plaint or Information in any of the Courts of Record in Dublin in the name of the Attorney-General or in the name or names of an officer of Customs or by information before two or more Justices of the Peace.

These two sections have been replaced by section 186 of the Customs Consolidation Act, 1876, and section 11 of the Customs and Inland Revenue Act, 1879, under which this case is brought.

Section 186 is more elaborate than section 46 of the 1845 Act and provides that the act must be done "with "intent to defraud" and calls it an "offence" but this does not alter the nature of the charge, as under

both sections the defendant must have done the act "knowingly," from which, if established, intent must be inferred. The Justices under section 186 may order the offender to be detained corresponding with section 58 of the Act of 1845, and generally speaking and so far as the matters to be determined in this case are concerned, there is no distinction between the two statutes, save perhaps that the person charged is described in section 186 as the "offender" and the act as an offence, whereas this is only to be inferred in the earlier Act from the provision of a penalty. Under both Acts (section 84 of the Act of 1845 and section 232 of the Act of 1876) the Justices may in default of payment of any penalty commit the offender until it be paid, and under both there is in effect an *offence*, a necessary ingredient being *knowledge* and therefore *intent*. A penalty follows on *conviction* and in default of payment the offender can be *committed* until it is paid.

By the Customs and Inland Revenue Act, 1879 (42 & 43 Vic., c. 21, sec. 12) an offender adjudged to pay a penalty of £100 or upwards may be committed in default for not less than six nor more than nine months and for a subsequent offence may be committed in lieu of penalty for not less than six nor more than twelve months.

The form of information before Justices is set out in the appendix to each Statute. The procedure following on the information and summons in a Court of Summary Jurisdiction is governed by the Petty Sessions (Ireland) Act, 1851, but the Act itself does not apply to Customs informations which remain as they were when the Act of 1845 was framed—see section 42 of the Petty Sessions Act.

Sherry's case decided that proceedings instituted by information under section 186 of the Customs Consolidation Act, 1876, before Justices are of a civil and not a criminal nature. In *A.-G. v. Radloff* (1), the proceedings were taken at the suit of the Attorney-General under sections 46 and 82 of the Act of 1845, and Martin, B., and Platt, B., held that they were civil

(1) 10 Ex. 84.

C.A. 1944.

FIRMAN v. MALOCCA.

BABINGTON, L.J.

and not criminal, Park, B. and Pollock, C. B., being of the contrary opinion. Platt, B., at p. 102, says: "Now let us see what is the object of this information. "Is it for the purpose of immediately on conviction "taking the body and punishing for the offence the "party who is found guilty? No, the object is to "recover money—to recover that which by the law "is made a debt." Martin, B. and Platt, B., were there contrasting the action for debt at the suit of the Attorney-General which they held to be civil with the information to recover penalties, both remedies being contained in section 82, and they held that the "intrinsic and essential nature of the act itself" (Martin, B., p. 96), and not the form of the proceedings must determine their nature, and that to hold the contrary would make the offence a crime or not a crime according to the form of proceeding adopted by the *Attorney-General.* Neither Baron Martin nor Baron Platt dealt with informations exhibited before magistrates under section 82 of the Act of 1845, but in *Sherry's case* decided under section 11 of the Customs and Inland Revenue Act, 1879 (42 & 43 Vic., c. 21), which is similar to the earlier Statute, the Court, following the reasoning of Barons Martin and Platt in *A.-G. v. Radloff* the judgments in *Rex v. Hausman* (1) and other authorities, held that the rule applicable to informations in the High Court also governs informations laid before Justices, which are therefore of a civil and not of a criminal nature. As the Court in *A.-G. v. Radloff* were equally divided, the nature of trials on the Revenue side of the Court of Exchequer may have been in some doubt until the Crown Suits Act, 1865 (28 & 29 Vic., c. 104), section 35, declared that the Revenue side of the Court as a Court of Law shall be deemed to be a Court of Civil Judicature within the meaning of section 103 of the Common Law Procedure Act, 1854.

Mr. Warnock argued that but for this section these cases would have been criminal and not civil, and that as the Crown Suits Act only applies to England, they are still criminal in Ireland whatever they may be in England.

(1) 73 J.P. 516.

The decision in *Sherry's case* disposes of this argument. In that case the Court treated Revenue cases in Ireland as being of the same nature as in England and followed the reasoning of Brett, M.R., in *A.-G. v. Bradlaugh* (1), when he says at p. 669 that the Crown Suits Act "seems to have decided the controversy in "favour of those judges who considered that a suit or "information for penalties on the Revenue side of the "Court of Exchequer was not a criminal proceeding," or in other words, that though the Crown Suits Act was not declaratory in form it was in reality an affirmation of the law as it stood before the Act was passed and that a suit or information for penalties on the Revenue side of the Court of Exchequer was never a criminal proceeding.

Sherry's case further applied this rule to informations before Justices. Andrews, L.C.J. (then L.J.) says at p. 233 : "It would be unreasonable to treat the penalty "as being of a civil character when sued for by action "and as of a criminal character when proceeded for by "information either in the High Court or before "Justices," and that "it would be an absurd "conclusion at which to arrive and one which, I "conceive, would be at variance with the true view "of our law, that when a person is charged with an "offence under the Customs Acts the character of the "proceedings with all that it involves should be "determined by the forum arbitrarily selected either "by the Attorney-General or by a Customs official. "It would be doubly absurd if the smaller offences, "which would naturally be brought before the Justices, "were branded as criminal, whilst the more serious "cases tried in the High Court were regarded as of a "purely civil character."

I need not refer to all the authorities relied on in that case. The decision is binding on us unless the nature of the information under section 186 of the Customs Consolidation Act, 1876, has been altered by the Finance Act, 1935.

Section 15 of that Act provides that "Where a person "is convicted of an offence under section 186 of the

(1) 14 Q.B.D. 667.

C.A. 1944.

FIRMAN v. MALOCCA.

BABINGTON, L.J.

"Customs Consolidation Act, 1876, . . . the Court "may if it thinks fit in lieu of ordering him to pay a "penalty order him to be imprisoned for a term not "exceeding two years."

What effect, if any, has this provision on cases brought by an information under section 186? As the law stood before the Act of 1935 we must hold that these cases were civil in their nature whether taken by information in the High Court or by information laid before a Resident Magistrate, before whom the proceedings might always have terminated in imprisonment of the defendant for non-payment of the penalty under the Acts of 1845 and 1876 or in lieu thereof as a primary sanction for a second offence under the Act of 1879. In *Sherry's case* Megaw, J., appears to have had some difficulty in reconciling this latter provision of section 12 of the Act of 1879 with his decision that the proceedings were of a civil nature.

In that case the charge had to do with a first offence so that the defendant could not have been imprisoned if he paid the penalty awarded, and Megaw, J., held this to be the dividing line between criminal and civil proceedings, saying at p. 259: "I am disposed to think "that there is a point of demarcation indicated which "gives the criterion as to whether a matter before the "Courts is to be regarded as a criminal cause or matter. "Liability to imprisonment for an offence is not an "absolute test of criminality within the Statute we "are considering but it is a factor of very considerable "importance. Apart from the case of contempt of "Court, where the legal sanction has its origin in a "very exceptional jurisdiction, I am disposed to think "that a satisfactory and convenient criterion con-"formable to reported cases may be found in determ-"ining the question at issue, viz.:—Whether as regards "any infraction of the law imprisonment can be im-"posed as a primary sanction either as the sole sanction "or as alternative to a fine."

This line of reasoning suggests that if the offence in *Sherry's case* had been a second or subsequent one Megaw, J., would have held the cause or matter to be of a criminal nature, but his opinion is not definitely

expressed, and looking at the judgments as a whole we think the decision established the proposition that even in the case of a second or subsequent offence the information originates a civil and not a criminal suit. To hold otherwise might lead to endless difficulties. In the first place an offence is either a criminal one or it is not, and it is difficult to understand how the nature of offence number two can be altered by reference to offence number one, and if a defendant is proceeded against by information in the High Court in respect of offence number one which has been held to be of a civil nature and is now so in England by statute and he is subsequently brought before a Resident Magistrate in respect of offence number two, is this a first or a second offence within section 12 of the Customs and Inland Revenue Act, 1879 ?

We think these difficulties arise through failing to keep clearly in mind the distinction between the nature of the act itself and the procedure by which the defendant is challenged. There may be cases, as Megaw, J., says in *Sherry's case*, at p. 259 : " Where " criminality or non-criminality depends on the pro- " cedure followed " but he goes on to say that, in his opinion, " a Court should not so hold unless absolutely " forced to do so by authority."

We agree with this proposition, but we are of the opinion that in the present case the procedure would have been of a civil nature before the Legislature gave the Court power to award imprisonment in lieu of the penalty provided by section 186 and that the form of the proceedings has not been changed, so that the net point which we have to decide is whether the alteration in the penalty alters the " intrinsic and essential " nature of the offence itself "—Martin, B., in *A.-G. v. Radloff* (1), at p. 96. In that case the Court was contrasting the procedure at the suit of the Attorney-General for penalties by way of information with the procedure of action for debt, and the reasoning of Martin, B., and Platt, B., was adopted by this Court in *Sherry's case* and held to apply to informations laid before Justices.

If proceedings be instituted for penalties by in-

(1) 10 Exch. 84.

C.A. 1944.

FIRMAN v. MALOCCA.

BABINGTON, L.J.

formation in the High Court at the suit of the Attorney-General, section 12 of the Customs and Inland Revenue Act, 1879, applies, and on conviction the defendant can be imprisoned either for non-payment of the penalty or, if the offence be a subsequent one, in lieu of payment of the penalty, and he can now be imprisoned in lieu of payment for a first offence under section 15 of the Finance Act, 1935.

There is therefore no essential difference between proceedings for penalties in the High Court and before Justices. Both are instituted by information and the remedies by penalty or by imprisonment, whether as a primary sanction or in default of payment, are the same.

The Finance Act of 1935 introduces no new element into the offence that was not present when *Sherry's case* was decided by this Court, for imprisonment could then have been ordered for a second or subsequent offence which suggests that Parliament was not dealing with an act criminal *per se* but endeavouring to protect the Revenue from persistent acts of evasion.

We are bound by the decision in *Sherry's case* and hold that the offence charged in this case was not a criminal offence and that the proceedings taken on the information did not constitute a criminal cause or matter notwithstanding that they might have resulted in the imprisonment of the defendant.

To hold the contrary would in our view overrule the decision in *Sherry's case* and take all Revenue proceedings under section 186 of the Customs Consolidation Act, 1876, out of the category of civil causes and make them proceedings in a criminal cause or matter contrary to a long line of judicial authority and without any further indication from the Legislature than is to be gathered from section 12 of the Customs and Inland Revenue Act, 1879, and section 15 of the Finance Act, 1935, which permit the Courts to order imprisonment in certain cases as ancillary to the main object of the Revenue Statutes, namely, the recovery and protection of the Revenue and possibly the safety of the Realm during the present state of war.

It would have been a simple matter for Parliament

to have made these alleged criminal offences punishable on indictment as misdemeanours or felonies as in the case of proceedings under sections 190 and 193 of the Customs Consolidation Act, 1876, but neither of these Statutes contains any such provision, and in the absence of such statutory declaration we hold that *Sherry's case* applies and is binding on us. Accordingly we will answer the question submitted to us by the County Court Judge in the affirmative.

Solicitor for the complainant : *Chief Crown Solicitor.*
Solicitors for the defendants : *Fisher & Fisher.*

M.V.P.

C.A.
1944.

Feb. 28, 29.
April 25.

HUGH MACK & COMPANY, LIMITED,
v.
BURNS & LAIRD LINES, LIMITED.

Carriage of Goods by Sea—Loss of Goods—Conditions of shipment safeguarding shipowners—Validity—Carriage of Goods by Sea Act, 1924 (14 & 15 *Geo.* 5, *c.* 22), *sec.* 3 *and Schedule, Article* 6.

The plaintiffs in Belfast delivered goods to the defendants for carriage to Scotland, with a consignment note and the defendants' form of receipt for the goods; both documents embodied the defendants' conditions of carriage, and both were marked "Non-negotiable." The receipt was signed on behalf of the defendants and was returned to the plaintiffs. No bill of lading was issued. The goods were lost in transit. The conditions of carriage, if valid, were sufficiently wide to protect the defendants from liability for the loss of the goods.

In an action for damages for loss of the goods.

Held, by the Court of Appeal (Andrews, L.C.J., Babington, L.J., and Brown, J.):—

1. That the Carriage of Goods by Sea Act, 1924, did not apply to the case because the receipt given was not a "bill of lading or "similar document of title."

2. That section 4 of the Carriage of Goods by Sea Act, 1924, modifies Article VI of the Schedule to the Act in the case of the carriage by sea from any port in Great Britain or Northern Ireland to any other port in Great Britain or Northern Ireland, or to a port in Eire, and in such a case a carrier and a shipper are at liberty in regard to goods of any class, to enter into any agreement in any terms as to the responsibility and liability of the carrier for such goods, and as to his rights and immunities in respect of them, including a stipulation as to seaworthiness so far as the stipulation is not contrary to public policy, provided that no bill of lading is issued and that the terms agreed are embodied in a receipt which is a non-negotiable document and is marked as such, and that the defendants were not liable.

Hugh Mack & Company, Ltd. *v.* Burns & Laird Lines, Ltd. (1943) N.I. 26, not followed.

CASE STATED under the Civil Bill Courts Procedure Amendment Act (Ireland), 1864, sec. 35.

The facts appear in the judgment of the Lord Chief Justice.

Porter, K.C., and *Hanna* for the plaintiffs.

Fox, K.C., and *M. W. Gibson* for the defendants.

Cur. adv. vult.

ANDREWS, L.C.J.: This is a case of very great importance affecting the respective rights and liabilities of traders and shipowners in relation to the coastwise carriage of goods by sea from and to ports situate in the British Isles.

Messrs. Hugh Mack & Co. (hereinafter referred to as "the shippers") sued Messrs. Burns & Laird Lines, Ltd. (hereinafter referred to as "the shipowners") for £50 damages alleged to have been sustained by them by reason of the negligence of the shipowners, their servants or agents, in and about the carriage of certain goods, and for money paid for a consideration which failed. By consent the civil bill was amended by the addition of a count for breach of contract and non-delivery of the goods.

The learned Recorder, before whom the claim first came, followed, as he was bound to do, the decision of Murphy, L.J., in a precisely similar case between the same parties, the report of which will be found in (1943) N.I. 26. When the present case came before Babington, L.J., on appeal, the shipowners, acting upon the suggestion made by Murphy, L.J., in the first case (see p. 27), applied for a case stated in order to obtain the opinion of this Court upon the important legal issues involved. No evidence was given as the facts were agreed upon; and, as Babington, L.J., did not express, and, indeed, was not invited to express, any opinion upon the case, it was agreed that he should be free to sit as a member of this Court on the hearing of the Case Stated.

The facts of the case are fully set out in the Case Stated, but it is necessary that I should summarise them as briefly as possible in this judgment. The goods in question, which involved two separate consignments, were consigned by the shippers for carriage to certain named consignees in Scotland. With each consignment the shippers handed to the shipowners a consignment note together with a form of receipt for the goods. These consignment notes

C.A. 1944.

HUGH MACK & CO., LTD. v. BURNS & LAIRD LINES, LTD.

ANDREWS, L.C.J.

and receipts were on the shipowners' own printed forms, and were filled up by the shippers. Upon receiving the goods and accompanying documents the shipowners' checker stamped the consignment notes and receipts with a rubber stamp containing in red ink the following words :—

> BURNS AND LAIRD LINES LTD.
>
> Received and carried subject to conditions specified in Coy's Sailing Bills.
>
> NON-NEGOTIABLE.

The freight was marked paid. The checker signed the receipts on behalf of the shipowners and handed them back to the shippers who retained them ; he himself retained the consignment notes on behalf of the shipowners. Each consignment note and receipt bears upon its face in large capital letters the word "Non-" negotiable." The consignment note then sets out the shipowners' name and a reference to the Port of Belfast as the port from which the goods were consigned, followed by the words :—" Please receive for forwarding " per Burns and Laird Lines' Steamers the undernoted " goods, which are to be carried and held on the terms " of the Company's Conditions of Carriage, set out on " the back hereof." The same words are also to be found in the receipt with the substitution of the word " Received " for the words " Please receive." The Conditions are set out on the back of both documents under the heading in large black type " Notice to " Passengers and Shippers—Conditions of Carriage." The conditions themselves are printed in clear but most diminutive type. They are in precisely the same terms as those set out in larger and much more legible type in the shipowner's Sailing Bills. No point arises, however, in this case as to the sufficiency of notice of the conditions. In terms they are of a drastic character. They are introduced with the Notice that " the shipowners are not, and do not carry on the " conditions of common carriers, but only on the

" conditions and terms set forth in any Bill of Lading " or Cattle Contract ; and when there is no such Bill " of Lading or Cattle Contract they only receive . . . " goods subject to the following conditions, whether " embodied in a form of receipt or not." These conditions, which are very numerous, include a provision of non-liability for any loss or delay ; for loss by theft, for unseaworthiness or unfitness in ship ; for the acts or neglect of master or crew, or of persons connected with the working or management thereof, or with the management, loading, discharge, stowage, storage, carriage and handling of the cargo, whether before, after or during the voyages. They also provide that the company, masters or agents shall not be responsible as carriers for loss or injury to goods arising from any cause. At the end of the conditions in each of the documents mentioned there is a Notice as to " Insurance of Cargo " which mentions (amongst other matters) that " special rates are quoted to " include Insurance, in which case the premium payable " to underwriters will be paid by the Company out " of the freight, and the company will act as agents " for shippers and for consignees to effect insurance . . . " covering . . . theft and all risks of whatsoever kind " and loss or damage however incurred. . . ."

In my opinion these conditions, if valid, applied to the shipowners' custody of the goods from the time that they received them. The shipowners were not mere bailees ; their possession was referable to the special contract. See speech of Lord Buckmaster in *Smith v. Great Western Railway Co.* (1), at pp. 187-8. It is no exaggeration to say that the conditions are so designed as to relieve the shipowners from almost every conceivable liability ; and it is stated in the Case that it is agreed that if the conditions are valid they are sufficiently wide to relieve the shipowners from liability for the loss of the goods in question.

It is further found in the Case that the shippers had been sending traffic by the shipowners' steamers for many years under the conditions referred to ; and that the custom is and always has been to carry this

(1) [1922] 1 A.C. 178.

C.A. 1944.

HUGH MACK & Co., LTD v. BURNS & LAIRD LINES, LTD.

ANDREWS, L.C.J.

class of traffic under the shipowners' Conditions of Carriage as published in their Sailing Bills and incorporated in their consignment notes, and, since the Carriage of Goods by Sea Act, 1924, to carry such traffic under the shipowners' said conditions of carriage, in addition to which a Receipt marked "Non-negotiable" is issued as in the present case.

The sole questions at issue relate to the application and construction of the Carriage of Goods by Sea Act, 1924. It is much to be regretted that, as is most candidly admitted, when the previous case was before Murphy, L.J., he received but little assistance in the way of legal argument, as counsel on both sides were agreed at that time that the Act of 1924 did not apply. When holding that in his opinion the Act did apply the learned judge made it clear that if he had not come to this conclusion he should have affirmed without hesitation the dismiss given by the Recorder.

There could in my opinion be no doubt whatever as to the shipowners' freedom from liability apart from the provisions of the Act. Shipowners were at common law common carriers, or, to speak more accurately, they were as regards liability in the position of common carriers. They were, accordingly, absolutely responsible, in the absence of express conditions, for the safety of the goods entrusted to them while they remained in their hands as carriers, damage caused by the Act of God or the King's enemies, or the inherent defects of the goods only excepted. But the position of a carrier by sea has long been recognised to be wholly different from that of a carrier by land in this respect, that, in the absence of fraud, which of course vitiates every contract, it was competent for the carrier by sea to contract out of his obligations as such common carrier and to enter into almost any conceivable contract he pleased. There was no statutory or other obligation that the conditions of carriage should be reasonable such as was imposed by section 7 of the Railway and Canal Traffic Act, 1854. This right of freedom of contract prior to the Act of 1924 was unquestionable, and will be found recognised in many cases including *Devitt v. The Glasgow, Dublin and*

Londonderry Steam Packet Co., Ltd. (1), *Baxter's Leather Co. v. Royal Mail Steam Packet Co.* (2), and *Gosse Millard v. Canadian Government Merchant Marine* (3).

This state of the law was open to grave objections in the case of the carriage of goods under Bills of Lading. These were not only contracts of carriage but also documents of title, which, by custom and under the Bills of Lading Act, 1855, passed freely from one person to another, conferring on their holders both rights and liabilities. Thus parties, such as consignees and indorsees, became interested in bills of lading who had not been concerned in the original contracts and had not had any adequate opportunity of acquainting themselves with their terms. These circumstances, taken in conjunction with the diversity and complexity of the conditions, presented a strong case for standardisation, the need being obviously greatest in the case of international trade.

This demand for uniformity found expression in the Carriage of Goods by Sea Act, 1924. Its historical aspect, and also its scope, are to be found briefly expressed in the preamble to the Act. An International Conference on Maritime Law was held at Brussels in October, 1922, when it was unanimously agreed that the delegates should recommend their respective Governments to adopt as the basis of a convention a draft convention for the *unification* of certain Rules *relating to bills of lading*. At a further meeting also held at Brussels in October, 1923, the Rules of this draft convention were amended, and such amended Rules, apparently with further modifications, are set out in the Schedule to the Act of 1924, Parliament deeming it expedient that, subject to the provisions of the Act, they should be given the force of law with a view to establishing the responsibilities, liabilities, rights and immunities attaching to carriers *under bills of lading*. Thus the operation of the Rules is by the express terms of the preamble confined to carriage of goods under Bills of Lading. By section 1 it is enacted

(1) 29 I.L.T.R. 30.
(2) [1908] 2 K.B. 626, 630.
(3) [1927] 2 K.B. 432, 434.

C.A. 1944.

HUGH MACK & CO., LTD. v. BURNS & LAIRD LINES, LTD.

ANDREWS, L.C.J.

that, subject to the provisions of the Act, these Rules, which are scheduled to the Act, should have effect in relation to and in connection with the carriage of goods by sea in ships carrying goods *from* any port in Great Britain or Northern Ireland to any other port whether in or outside Great Britain or Northern Ireland. The application of the Rules was thus further limited to "outward" bills of lading, the intention of the Brussels Conference being that each State represented at the Conference should legislate on similar lines in respect of all its "outward" traffic carried under Bills of Lading. Section 1 must be read in connection with section 3 which enacts that every bill of lading, or similar document of title, issued in Great Britain or Northern Ireland which contains or is evidence of any contract to which the Rules apply, shall contain an express statement that it is to have effect subject to the provisions of the Rules as applied by the Act. Wholly apart from the provisions of this section the Rules would, it would appear, apply to such Bills of Lading by virtue of the joint effect of section 1 of the Act and Article 2 of the Rules; but the policy of the legislature in dealing with a negotiable instrument was for greater definiteness to require the precise legal position to be made clear in the Bill of Lading itself.

Before passing from section 3 I must draw attention to the extension which it contains of the term "bill "of lading" by the addition of the words "or similar "document of title." Doubt has been expressed as to their meaning; and Murphy, L.J., basing his opinion largely upon a passage in *Temperley's* text-book on the Act at p. 9, held that a contract such as that before him (and, therefore, such as is now before us) was "of the bill of lading type." In my opinion the association in that passage of a "bill of lading" with "a receipt embodying the conditions of carriage" as falling under one class of contract for the carriage of goods by sea is unfortunate as suggestive of the view that a receipt embodying such conditions is a "similar "document of title" to a bill of lading. I am satisfied, however, that this was not intended by the author of

that standard work. These two varieties of contract relating to particular parcels of goods were merely grouped together in contrast with the second class of contract referred to by the author in which the appropriate document is a charter party. As pointed out by Mr. Fox other passages in that text-book, at pp. 8 and 9, prove conclusively that the learned author's views are that, quite apart from charter-parties to which the Rules do not apply (see Art. 5), the Rules contemplate that there may be contracts for the carriage of goods which are altogether outside their scope—contracts which are not covered by a bill of lading or any similar document of title. In my opinion a contract of such character may be evidenced by a receipt such as that which is before us in the present case. Such a receipt, even if it can be properly described as a "document "of title," is not "similar to" a bill of lading. It has none of its characteristics. It is different in form ; it is given at a different time ; it bears no stamp ; it does not acknowledge the goods to be on board any particular ship, nor, indeed, does it acknowledge a shipment on board at all ; it is retained by the consignor, not sent to the consignee ; above all, it is not a negotiable instrument, the indorsement and delivery of which may affect the property in the goods shipped. (See in this connection the judgment of McCardie, J., in *Diamond Alkali Export Corporation v. Bourgeois* (1), at pp. 449-453). What then, it may be asked, is the meaning of the words "similar document of title"—words which are to be found also in section 6 (3) of the Act and which have probably been taken from the Canadian Water Carriage of Goods Act, 1910. I shall not purport to give an exhaustive definition ; but the term doubtless includes what is known as a "received for shipment" bill of lading—a document issued before shipment as distinguished from a bill of lading properly so called which is not signed or delivered until after shipment has taken place. Suffice it, however, for me to say that in my opinion the phrase does not include a mere receipt such as was given by the shipowner to the shipper in this case.

(1) [1921] 3 K.B. 443.

C.A. 1944.

HUGH MACK & CO., LTD. v. BURNS & LAIRD LINES, LTD.

ANDREWS, L.C.J.

Upon the wording of both the preamble and the enacting sections of the Act I am therefore of opinion that it was to carriage of goods by sea under bills of lading and similar documents of title as I have interpreted these words, and to no others, that the provisions of the Act as to the responsibilities and liabilities of shipowners were intended to apply. This view, I must add, is strongly confirmed by reference to the Rules in the Schedule which there bear the title "Rules relating to Bills of Lading." These words are part of the Act, and they clearly indicate the scope of the Rules. In Article I a "carrier" is defined as including the owner or the charterer who enters into a contract of carriage with a shipper; and the term "contract of carriage" applies only to "contracts of "carriage covered by a bill of lading or any similar "document of title . . ., including any bill of lading "or any similar document . . . issued under or "pursuant to a charter party . . ." The words "covered by a bill of lading" are not free from ambiguity, and the difficulty in construing them is increased by reference to Art. III, r. 3, under which an obligation is placed upon the carrier, on demand of the shipper, to issue a bill of lading in a certain form; for, if there be no "contract of carriage" and therefore no "carrier" until the issue of a bill of lading, rule 3 becomes unmeaning. The only way of overcoming this difficulty which presents itself is by giving a wide interpretation to the word "covered" so as not necessarily to imply the actual prior issue of such a bill but to include also a case in which the right to a bill of lading exists, as, for example, by well established custom of the trade. This is the view expressed by Lord President Clyde in *Harland & Wolff v. Burns & Laird Lines* (1), where the Lord President points out that contracts of affreightment are often made informally, and that in such cases the conditions of the contract are accepted as being those which in the particular trade are subsequently incorporated in the bill of lading usual in that trade, that is to say, in the bill which, at or after shipment of the goods, the shipper

(1) [1931] S.C. 722, 728, 729

becomes entitled to demand from the master or shipowner. "In such cases," says the Lord President, "the contract of affreightment is truly 'covered' by "that bill although not necessarily issued contempor- "aneously with the conclusion of the contract." But, as it appears to me, in order to prevent the possibility of an unduly extended meaning being assigned to his words, the Lord President adds in the immediately succeeding paragraph that "there are "in the coasting trade and in the trade between this "country (i.e., Scotland) and Ireland manifold in- "stances in which bills of lading are neither used nor "practicable—the conditions of carriage being those "which are published in the shipowners' sailing bills. "In these instances there is no 'carrier' and no "'contract of carriage' within the meaning of the "Act, and if I am right the Act does not apply to "them."

It only remains to consider the provisions of Article VI which is entitled "special conditions," and which is necessarily of paramount importance as it opens with the over-riding words "notwithstanding the "provisions of the preceding Articles." It provides, in effect, simply for a "carrier" and a shipper in regard to any *particular goods* contracting out of the Rules by entering into any agreement in any terms as to the responsibility and liability and the rights and immunities of the carrier, or the obligation as to seaworthiness, so far as this stipulation is not contrary to public policy, or the care or diligence of his servants or agents, provided two conditions are complied with, namely, (1) that in such case no bill of lading has been or shall be issued; and (2) that the terms agreed shall be embodied in a receipt which shall be a non-negotiable document and shall be marked as such. By the terms of the Article any agreement so entered into shall have full legal effect. A proviso negatives the application of the Article to ordinary commercial shipments made in the course of trade; but section 4 of the Act modifies Article VI in regard to coasting trade by extending its provisions to *any class of goods* and by omitting the proviso.

C.A. 1944.

HUGH MACK & CO., LTD. v. BURNS & LAIRD LINES LTD.

ANDREWS, L.C.J.

In my opinion this Article as so modified affords no help whatever to the shippers in the present case. The argument advanced on their behalf is that this Article applies, and that the words "so far as this "stipulation is not contrary to public policy" should be read as if "stipulation" referred back to and in fact was synonymous with "agreement," so that none of the terms of the agreement must be contrary to public policy. They further submitted that the shipowners' conditions of contract are contrary to public policy in the present case by reason of the fact that they purport to relieve the shipowners from every conceivable liability. I am unable to accept any portion of this argument. In the first place, the Article has in my opinion no application, as the shipowners are not a "carrier" within the Rules as that term is defined and as it has been already explained. In the second place, even if the Article did apply, no authority has been cited which would justify me in holding that the terms of this contract, which have hitherto been in general use (with perhaps some occasional modification) by shipowners engaged in the coasting trade in this country, have suddenly become contrary to public policy by reason of the passing of the Act of 1924 whose object was merely to secure greater uniformity of contract in a different class of trade carried on under bills of lading. In truth, as it appears to me, it is not a matter of public policy; it is simply a question as to which of the parties is to insure the goods. The words of the Earl of Halsbury, L.C. (at pp. 490-1) and of Lord Davey (at p. 500) in the case of *Janson v. Driefontein Consolidated Mines Ltd.* (1), show clearly that, to quote the latter's words, "public policy is always an unsafe "and treacherous ground for legal decision." To the like effect is the opinion of Farwell, L.J., in *Hyams v. Stuart King* (2): "The doctrine of public policy is "regarded nowadays as one rather for the Legislature "than the Courts." Finally, I am of opinion that the word "stipulation" is not to be read as referable to "agreement." They are evidently not regarded

(1) [1902] A.C. 484, 500. (2) [1908] 2 K.B. 696, 727.

as synonymous terms in Article VII where both words are used. The term "stipulation" in my opinion refers, and refers only, to the obligation of seaworthiness which immediately precedes it. In no other way do I find it possible to give the words of the Article a grammatical construction. It is the interpretation which is assumed in *Scrutton on Charterparties and Bills of Lading*, 14th Edit., p. 506; and, if the contrary is implied (rather than decided) by the learned Lord President in *Harland & Wolff v. Burns & Laird Lines* (1), at p. 730, I must respectfully dissent from such view. The construction which I have given to the Article is supported by the drafting of the corresponding section of the United States Carriage of Goods by Sea Act, 1936—an Act passed in fulfilment of the same international agreement, and which, for greater clarity brackets the words from "so far as the stipula- "tion" to "public policy," and so makes them clearly referable solely to the obligation as to seaworthiness.

In conclusion, therefore, I am of opinion that the Act of 1924 has no application to the present case, or to the coasting trade generally in so far as it is carried on with non-negotiable receipts instead of bills of lading. The Rules only affect the latter class of trade; and in my opinion section 4 of the Act was passed to modify Article VI merely in order to provide for the possibility of some exceptional form of coasting traffic in which the custom might theretofore have been to carry it on under bills of lading or similar documents of title, or perhaps to meet the fears of the coasting trade as to possible developments of the trade after the passing of the Act. However, even if I am wrong in this, and if the present case falls within the scope of the Act, I consider that Article VI, as modified by section 4 and as construed by me, affords the shipowners complete protection by reason of the fact that the terms of the agreement of carriage were embodied in a receipt which was marked "non- "negotiable."

I, accordingly, hold in favour of the shipowners and answer the question submitted to us as to the

(1) [1931] S.C. 722.

C.A. 1944.

HUGH MACK & CO., LTD. v. BURNS & LAIRD LINES, LTD.

ANDREWS, L.C.J. BABINGTON, L.J.

shippers' right to recover the sum sued for in the negative. The shippers will, however, be entitled to their costs as provided in the Case Stated.

BABINGTON, L.J.: I agree with the judgment delivered by the Lord Chief Justice.

The case is in effect an appeal from the decision of Murphy, L.J., in *Hugh Mack & Co., Ltd. v. Burns & Laird Lines, Ltd.* (1), holding that the Carriage of Goods by Sea Act, 1924, applies to coastwise traffic when the goods are carried upon a consignment note signed by the consignor embodying the familiar conditions adopted by coastwise shipping companies and absolving them from liability for loss or damage, as the Lord Justice says, "under any conceivable "circumstances" and accepted by the consignees on these conditions. Having so held, the Lord Justice went on to decide that Article VI of the Act of 1924 controls the former rights of shipowners to limit their liability and that the contract of carriage must not be "contrary to public policy or the care or diligence of "his servants or agents in regard to the loading, "handling, stowage, carriage, custody, care or dis-"charge of the goods carried," and he held that the conditions in that case which are similar to those we have to deal with in the present case were "contrary "to public policy" and void. The two cases are identical in all material respects.

Before the Act of 1924 the defendants could undoubtedly have imposed these conditions, and in fact a large quantity, if not the bulk, of United Kingdom coastwise shipping was carried under similar conditions which, whether they were reasonable or not, were perfectly legal, and though they have often been challenged I know of no reported case in which they have been held to be void as being contrary to public policy. It follows therefore that unless the Act of 1924 has altered the law the plaintiffs' case must fail.

The object of the Carriage of Goods by Sea Act, 1924, is indicated by its preamble, which shows that the Act was only intended to implement an international

(1) [1943] N.I. 26.

convention for the unification of certain rules relating to bills of lading, and the provisions of the Act itself apply only to the carriage of goods covered by a bill of lading or other similar document.

In the present case there was no bill of lading or, in my opinion, any other similar document. The goods were carried under a form of contract which is well known and has been in use for a very long time.

The consignment note was receipted by the shipping company " Received and carried subject to conditions " specified in Company's sailing bills " ; these conditions are in fact printed on the back of the consignment note itself, which is marked " non-negotiable."

Even if it be correct, as the Lord Justice says, that the shipping company would be bound to issue a bill of lading after receiving the goods into its charge on demand of the shipper, a question upon which I express no opinion, there was no such demand in this case and no such document was issued, and I cannot understand how the consignment note embodying the conditions signed by the consignee and the receipt for the goods endorsed thereon by the shipping company can be said to be anything more than a contract to carry the goods subject to the conditions agreed on by both parties.

The consignment note and receipt endorsed thereon is not a bill of lading or a document of title, and the endorsement " Non-negotiable " does not alter the nature of the document or make it a document of title, and the contract of carriage is therefore not affected by the Act of 1924 which by Article I only applies to contracts covered by a bill of lading or any similar document of title.

It follows from what I have said that Article VI has no application to the present case ; but assuming that this contract of carriage is one to which the Act applies, Article VI gives the carrier and shipper the right to contract out of the Act by entering into an agreement in any terms as to the responsibility and liability and the rights and immunities of the carrier.

This provision would cover the contract in the present case, but Murphy, L.J., held that it is governed

C.A. 1944.

HUGH MACK & CO., LTD. v. BURNS & LAIRD LINES, LTD.

BABINGTON, L.J.

by the subsequent words "so far as this stipulation "is not contrary to public policy," and that he had to consider whether the conditions sought to be imposed were contrary to public policy and therefore void, and he decided this question in the affirmative.

The Article is somewhat obscure and clumsily drafted, but I think it is clear that the provision as to public policy only applies to the obligation as to seaworthiness and has no application to any agreement entered into between the carrier and the shipper, who are therefore free under the Act to make any contract they like.

I also agree with the Lord Chief Justice that no question of public policy is involved in this contract between individuals which has no effect on anyone but themselves and that the argument founded upon an alleged bailment is unsustainable.

BROWN, J.

BROWN, J.: I have had the privilege of reading the judgments which have just been delivered and I agree with them.

I desire to express my own opinion briefly about what I consider to be the effect of Article III, rule 3, of the Carriage of Goods by Sea Act, 1924. It seems to me that the object of that rule is to enable the shipper where the contract is by Bill of Lading to demand and obtain his Bill of Lading at an earlier date. Under this rule the carrier must issue to the shipper on demand a Bill of Lading after the goods have been received by the carrier into his charge, i.e., the shipper need not wait for his Bill of Lading until the goods have been taken on board any particular ship. Once the carrier has received the goods into his charge, even though he may keep them in a warehouse or store for some days before actually putting them on board, the shipper is entitled to receive his Bill of Lading—a negotiable instrument of which he may make immediate use.

Solicitor for the plaintiffs: *G. H. Leitch.*
Solicitors for the defendants: *McKinty & Wright.*

M.V.P.

K.B.D.
1944.

May 8, 11.
June 13.

In re BEGGS.

Habeas corpus—Applicant sentenced to penal servitude for three years from date of his arrest—Legality of sentence—Remedy under Criminal Appeal (Northern Ireland) Act, 1930 (20 & 21 Geo. 5, cap. 45).

The Court of King's Bench will not in general grant a writ of habeas corpus to bring up a prisoner under a sentence, alleged to be illegal, imposed by a Superior Court. The proper method of reviewing such a sentence is by appeal under the Court of Criminal Appeal (Northern Ireland) Act, 1930.

Motion to make absolute a Conditional Order of *Habeas Corpus ad Subjiciendum.*

The facts are stated in the judgment of the Lord Chief Justice.

Curran, K.C., and *Belford* for the applicant :—

A sentence of penal servitude cannot be imposed for a period less than three years, Penal Servitude Act, 1891, and the detention of the applicant is unlawful. A sentence cannot be ante-dated beyond the first day of the sessions in which it is imposed : *R. v. Crockett* (1) ; in *R. v. Davies* (2) the Lord Chief Justice said that the Court was not satisfied that it has the power of ante-dating a sentence to a day before the Sessions or Assizes. It is the constitutional right of the applicant to be discharged if his detention is illegal : *Cox v. Hakes* (3), *Secretary of State for Home Affairs v. O'Brien* (4), *The State (Cannon) v. Kavanagh* (5).

MacDermott, A.-G., Fox, K.C., and *McVeigh* for the Crown :—

The present proceedings are misconceived. This Court will not review the judgment of a Superior Court,

(1) 21 Cr. App. R. 164.
(2) 7 Cr. App. R. 254.
(3) 15 A.C. 506.
(4) [1923] A.C. 603.
(5) [1937] I.R. 428.

K.B.D. 1944.

IN RE BEGGS.

such as a Court of Assize, on habeas corpus even if the defect alleged appears on the record. *Ex parte Lees* (1), *In re Dunn* (2). [He also referred to *Hughes v. Lennon* (3)] Before the Criminal Appeal (N.I.) Act, 1930, came into operation the appropriate procedure would have been by Writ of Error unless a case had been stated under the Crown Cases Act, 1848. By s. 18 of the Act of 1930, Writs of Error were abolished and the Act of 1848 was repealed, leaving, it is submitted, the Court of Criminal Appeal as the only Court competent to review the judgment of the Court of Assize. By virtue of s. 32 of the Judicature Act (Ir.), 1877, the expression " High Court " in s. 18 of the Act of 1930 includes a Court of Assize.

In fact the prisoner appealed to the Court of Criminal Appeal contending that his sentence was illegal. He then abandoned his appeal complying with Rule 10 of the Criminal Appeal Rules, 1931. This having been done the appeal was, by the terms of this Rule, " deemed to have been dismissed by the Court." The prisoner cannot now ignore this result. The Governor of the Gaol must observe the rules and their effect s. 16 (2) of the Act of 1930. He must hold a prisoner whose appeal has been heard and dismissed, and the custody is no less lawful if the appeal is deemed to have been dismissed.

Without prejudice to the question whether this Court can determine the matter it is submitted that the sentence imposed was good. Though doubts were expressed concerning the practice of ante-dating a sentence in *R. v. Davies* (4) and in *R. v. Rouse* (5), the only authority cited in support of the proposition that ante-dating invalidates a sentence is *R. v. Crockett* (6). The point was not argued in that case and no reasons were advanced for the view expressed that there was no power to ante-date. In *R. v. McLean* (7), a sentence of penal servitude was ante-dated by the Court of Criminal Appeal. Sentences of imprisonment are not infre-

(1) El., Bl. & El. 828. 120 E.R. 718.
(2) 5 C.B. 215 : 136 E.R. 859.
(3) [1935] I.R. 128.
(4) 7 Cr. App. R. 254.
(5) 10 Cr. App. R. 179.
(6) 21 Cr. App. R. 164.
(7) [1911] 1 K.B. 332.

quently imposed as from the date of committal and there is no ground for distinction between sentences of imprisonment and penal servitude in this respect. Whether the practice of ante-dating is good or bad it is submitted that there is no reason why it should invalidate the sentence. It is in case of the prisoner; it does not give rise to any ambiguity or uncertainty; it can hardly be repugnant to any principle of law as at Common Law sentences run from the first day of the Assize or Commission even when passed subsequently unless an order is made to the contrary. If it be objected that a prisoner can not be put to hard labour or penal servitude retrospectively it is submitted that this element of impossibility does not suffice to vitiate the sentence. The Court of Criminal Appeal may impose a new sentence to run from an earlier date, s. 13 (4) of the Criminal Appeal (Northern Ireland) Act, 1930. The existence of this statutory power indicates that ante-dating is not opposed to any principle of law. In the circumstances it is submitted the dictum in *Crockett's case* (1) is not binding upon this Court and ought not to be followed.

The contention that the prisoner could not be sentenced to less than three years penal servitude is not supported by the relevant enactments. He was tried for simple larceny which by s. 2 of the Larceny Act, 1916, is "punishable with penal servitude for "any term not exceeding five years." Sec. 1 (1) of the Penal Servitude Act, 1891, only provides for a minimum term of three years' penal servitude in cases where "under any enactment in force when this section comes "into operation a Court has power to award a sentence "of penal servitude." The intention was to leave subsequent legislation to deal with the question of a minimum term as was thought fit in each particular case. A minimum has often been fixed by subsequent Acts and it has always been a minimum of three years. See for example s. 1 of the Prevention of Corruption Act, 1916. But a minimum is not provided by the Larceny Act, 1916, in respect of the crime in question and it is submitted that such a minimum cannot be

(1) 21 Cr. App. R. 164.

K.B.D. 1944.

IN RE BEGGS.

implied. The intention underlying sub-sec. (1) of sec. 1 of the Act of 1891 is emphasized by sub-sec. (2) which expressly refers to future legislation.

ANDREWS, L.C.J.

ANDREWS, L.C.J. : This is a motion to make absolute a Conditional Order of *Habeas Corpus ad Subjiciendum* obtained on behalf of one, Ivan Alexander Beggs, on 19th April last. The material facts may be briefly stated. On 10th March last, at the Spring Assizes for the County of Antrim, Beggs was indicted for the larceny of certain webs of cloth and a quantity of gentlemen's overcoats, all of the value of £300 or thereabouts, and on a second count with receiving the same knowing them to have been stolen. He pleaded guilty to the larceny, and was sentenced by the presiding judge, Babington, L.J., to three years' penal servitude from the date of his arrest—17th February, 1944.

By Notice of Appeal, dated 17th March, 1944, addressed to the Registrar of the Court of Criminal Appeal, Beggs appealed against the said sentence on, as he stated, "one point of law—that my sentence is "illegal, and that it should be quashed." This Notice was followed on 29th March by a Notice of Abandonment under Rule 10 of the Criminal Appeal Rules, 1931. To the Form of Notice of Abandonment so served there is appended a note that "by Rule 10 of the "Criminal Appeal Rules, 1931, upon this notice being "given, the appeal shall be deemed to have been "dismissed by the Court of Criminal Appeal." Notice of such abandonment of appeal was duly given by the Registrar of the Court of Criminal Appeal to the Crown Solicitor for the County of Antrim in the usual form, intimating that by Rule 10 (*a*) the appeal should be deemed to have been dismissed by the Court of Criminal Appeal.

The alleged illegality in the sentence is stated in Beggs' affidavit, filed in support of his application for the Conditional Order, to be that the sentence could not be lawfully enforced as the minimum sentence of penal servitude which can be lawfully imposed is one of not less than three years. It is obvious that

the appeal was abandoned on advice, when it was realised that, if there was any illegality or irregularity in sentence, this could and doubtless would be set right by the Court of Criminal Appeal, probably to the prejudice of the appellant, by making the term of three years run from the date of sentence.

Several points were argued before us, the first and most important of which is whether this Court should grant a Writ of Habeas Corpus in the circumstances hereinbefore stated. It was also contended on behalf of Beggs that the sentence was unlawful, that is, that it was not a sentence authorised by law, and that the Governor of the Gaol to which Beggs had been committed had no lawful authority to receive and detain him under a sentence which was not effective. Upon these submissions we examined the statutory provisions relating to a sentence of penal servitude for an offence of simple larceny under section 2 of the Larceny Act, 1916, being the offence for which Beggs was indicted and sentenced. We also considered the authorities relating to the ante-dating of sentences in general, that is, making them run from a date prior to the date of sentence or to the opening day of the Commission.

Upon the first issue, which was presented to us as one of grave constitutional importance, Mr. Curran, who appeared on behalf of Beggs, claimed the constitutional right of his client to come to this Court to require his discharge upon his detention being established to be unlawful. He maintained that, even if the appeal had not been abandoned. and the Court of Criminal Appeal had heard the case and dismissed it, this would not have deprived Beggs of his remedy. So also, he contended, Beggs' constitutional rights could not be abrogated by Rules of procedure such as Rule 10 (*a*) already referred to. Mr. Curran cited to us authority of great weight such as *Cox v. Hakes* (1), *Secretary of State for Home Affairs v. O'Brien* (2), and *Eshugbayi Eleko v. Officer Administering the Government of Nigeria* (3). These cases

(1) 15 A.C. 506.
(2) [1923] A.C. 603.
(3) [1928] A.C. 459.

K.B.D. 1944.

IN RE BEGGS.

ANDREWS, L.C.J.

emphasise the well-established proposition that the writ of habeas corpus—a high prerogative writ—is one of the most important safeguards of the liberty of the subject—a writ which the Earl of Birkenhead referred to as "antecedent to statute and throwing "its root deep into the genius of our common law." So jealous is the law of that liberty that a person who, claiming to be in unlawful detention, fails in his application for the writ, may renew it to every judge or every court in turn, whether in term time or in vacation, each court or judge being bound to give it independent consideration. So, also when once a legally constituted court has determined that a subject of the Crown, who is an applicant for the issue of a writ of habeas corpus, is entitled to his liberty, such a judgment cannot be overruled either by any other court or by any court of review or appeal. "Finality "of liberation," as Lord Shaw calls it, has long been affirmed as a part of English constitutional law.

No one—last of all perhaps the learned Attorney-General—would seek to controvert these principles as general principles in our legal system; but the Attorney-General submits that there is ample well settled authority which denies their application to the present case in which the applicant for the writ is detained under an Order of Commitment made after judgment on an indictment according to the course of the common law. There are three cases to which in this connection I would particularly wish to refer. The first is *In re Richard Dunn* (1), in which the court refused to grant a habeas corpus to bring up a prisoner under sentence of the court of Queen's Bench for a misdemeanour in order to discuss the validity of the warrant under which he was committed. Dunn had been convicted of perjury, and was detained under two warrants of commitment. The first warrant was assailed on the ground that no mention was made in it of any definite term of imprisonment; the second on the ground that there was no jurisdiction on conviction for such an offence to order the prisoner to find sureties to keep the peace. In the course of the argument of Pashley,

(1) 5 C.B. 215, 136 E.R. 859.

counsel for the applicant, Maule, J., took the point that the remedy of the party, if he was entitled to any, was by writ of error. "You are," he said, "asking a court that is not a court of criminal juris- "diction, for a habeas corpus, upon an opinion that "a sentence pronounced by the Court of Queen's "Bench, which is still a subsisting sentence is erroneous. "Surely there is no authority for that." Wilde, C.J., leaves no doubt as to his meaning in the short judgment which he delivered. "It is perfectly clear," he said, "that the remedy of the prisoner in this case, if any, "is by writ of error. If we were to accede to this "application—which certainly is one of the first "impression—it would lead to consequences that "never were contemplated. It would follow that "every sentence pronounced by the Court of Queen's "Bench would be subject to be reviewed summarily, "even by a judge at chambers." The report ends with the words :—"The rest of the Court concurring, "Pashley took nothing."

In the second case—*Ex parte Lees* (1), an application was made for a writ of error or for a certiorari or for a writ of habeas corpus for the purpose quashing the conviction of Lees by the Supreme Court of the Island of St. Helena for an assault made with intent to do grievous bodily harm. The sentence imposed was one of imprisonment for the term of three years. The application for the writ of error failed because the Attorney-General had not issued his fiat. For the same reason—the absence of such fiat—the Court refused to direct a certiorari for the purpose of removing the record into the King's Bench Division and bringing a writ of error upon it. Lord Campbell, who delivered the judgment of the Court, also said in regard to the application for a writ of habeas corpus that it is not grantable in general where the party is in execution on a criminal charge, after judgment, on an indictment according to the course of the common law ; and that, even supposing it could run to St. Helena, it could only be useful as ancillary to or accompanying a writ of error, as it is only by writ of error that such judgment,

(1) El., Bl. & El. 828, 120 E.R.718.

K.B.D. 1944.

IN RE BEGGS.

ANDREWS, L.C.J.

according to the course of common law, can properly be reversed.

The third case to which I should also like to refer is *The State (Felix Cannon) v. John Kavanagh* (1), in which a writ of habeas corpus was sought on the ground that the Dublin Circuit Court in which the prosecutor, Cannon, was tried and convicted had no jurisdiction to try the offences charged, as it was contended that these offences, if committed at all, were not committed in Dublin. Both *R. v. Dunn* (2), and *Ex parte Lees* (3), were cited, and, in delivering the judgment of the Court, Maguire, P., said that the applicant for the writ was detained for execution of sentence after conviction on indictment in the Circuit Court, according to the course of the common law as amended by the Courts of Justice Act, 1924. "He is, "therefore," he continued, "*prima facie* detained "according to law, and it would require most ex- "ceptional circumstances for this Court to grant even "a conditional order of *habeas corpus* to a prisoner "so convicted." After stating that there were no such exceptional circumstances in the case the learned President commented on the fact that the applicant had taken the strange and inconvenient course of seeking habeas corpus when he might have applied to the Court of Criminal Appeal. This case, though not identical with the present, recognises the principle of in *In re Dunn* (2) and *Ex parte Lees* (3) to which I have referred and with which I respectfully express my entire concurrence.

This statement of the law as set out in *Ex parte Lees* (3) was accepted by Avory, J., in *R. v. Lewes Prison (Governor) Ex parte Doyle* (4), where the principle was applied to a person who had been convicted by a duly constituted Court-martial, the proceedings of which had been in due course confirmed by the competent authority. It was also adopted by Scrutton, L.J., in *R. v. Governor of Maidstone Prison Ex parte*

(1) [1937] I.R. 428.
(2) 5 C.B. 215, 136 E.R. 859.
(3) El. Bl. & El. 828, 120 E.R. 718.
(4) [1917] 2 K.B. 254, 274.

Maguire (1) (at p. 102). It is important to note that both of these two last mentioned cases were decided in England since the writ of error was abolished in that country by section 20 (1) of the Criminal Appeal Act, 1907—an Act which constituted a Court of Criminal Appeal in England, and created a right of appeal to that Court in the case of conviction on indictment.

The corresponding section of the Criminal Appeal (Northern Ireland) Act, 1930, is section 18, which follows the language of the English section in abolishing writs of error and the powers and practice then existing in respect of motions for new trials in criminal cases. It goes further, however, than the English Act by expressly providing that the Crown Cases Act, 1848, shall cease to have effect, and that, except as provided by the Act, no appeal shall lie from any judgment of the High Court in any criminal cause or matter. In my opinion these additional words in the Northern Ireland Act were intended to make it clear that procedure under the Act by appeal to the Court of Criminal Appeal should be substituted for such procedure as was abolished or declared to cease to have effect. In other words, the writ of error, with the protection which it afforded to the convicted prisoner, was not abolished without the provision of a substituted remedy—an appeal under the Act in the case of persons convicted on indictment (section 2). The language of section 18 is entirely at variance with the creation of what I hold, having regard to the authorities which I have cited, would be a new right in such cases—the granting of a writ of habeas corpus. Such right could only be conferred by express provision of which there is none.

In my opinion any conclusion other than that at which I have arrived would reduce the law to a state of chaos, especially in a small area such as ours with a judiciary whose members are necessarily very restricted in number. If habeas corpus were to lie in such a case as the present the same judges might be called upon to determine a habeas corpus application

(1) 59 I.L.T.R. 101, 102.

K.B.D. 1944.

IN RE BEGGS.

ANDREWS, L.C.J.

after they had already adjudicated upon the matter in the Court of Criminal Appeal ; for, as above stated, it was part of Mr. Curran's submission that, even if his client had proceeded with his appeal to the Court of Criminal Appeal and this had been dismissed, it would have been competent for him subsequently to apply to this Court for his " constitutional remedy " of a writ of habeas corpus. I am happy that the law does not in my opinion compel such an unfortunate conclusion. In my opinion, the writ of habeas corpus is not grantable in this case, which, unmeritorious and purely technical though it be, I have felt it my duty to determine solely on strictly legal grounds.

The conclusion at which I have thus arrived renders it unnecessary and, indeed, undesirable for me to express any opinion on the other points raised by Mr. Curran. Any view which I might express would, in the circumstances, be entirely *obiter*, and, accordingly, of little or no value in any subsequent case. The only observation which I shall permit myself to make relevant to these issues is that I entirely accept the opinion expressed in more than one case by the Court of Criminal Appeal in England as to the desirability of making sentences date from the day of conviction, or rather, as the sittings of a court of oyer and terminer or gaol delivery or quarter sessions are for most purposes contemplated in law as one day, from the opening day of the sittings of the Court. Indeed, it is from such opening day that a sentence runs if not otherwise ordered. It is only when it is in such a form that full effect can be given to a sentence of penal servitude or of imprisonment with hard labour. This practice, which I have followed for many years past, need not operate in any way to the prejudice of the accused, as the time that he has been in custody awaiting trial may properly be taken into consideration when determining the appropriate period of sentence.

The conditional order must be discharged.

BLACK, J.

BLACK, J. : I concur.

The Court of Assize which imposed the sentence whose validity the appellant seeks to challenge was

undoubtedly a Superior Court (*Ex parte Fernandez* (1), *In re McAleece* (2). We have not been referred to a single reported case in which a writ of habeas corpus was granted to discharge out of custody a person committed in execution of a sentence imposed after conviction on indictment by a superior court. The principle laid down in the text books is that the Writ would not be granted where the effect of it would be to review the judgment of a Superior Court which might have been reviewed on Writ of Error (Encyclopoedia of Laws of England, 2nd ed., Vol. VI., p. 480 : Halsbury Laws of England, Vol. X, p. 47, Hailsham edition, Vol. IX, p. 711). The case quoted as authority for the proposition is *Re Dunn* (3). In that case a prisoner convicted at *nisi prius* applied to the Court of Common Pleas for a Writ of habeas corpus on the ground of the alleged illegality of the sentence recited in the warrant of commitment. This is precisely the ground upon which the Writ is applied for in the present case. In *Dunn's case* (3) the Court refused the prisoner's application on the ground that there was no authority for the proposition that the Court would grant a Writ of habeas corpus for the purpose of (in effect) reviewing a sentence imposed by one of the Superior Courts and that the prisoner's remedy (if any) in such a case was by Writ of Error. Writs of Error have now been abolished by section 18 of the Criminal Appeal (Northern Ireland) Act, 1930, but prisoners convicted on indictment have been given under that Act a full right of appeal to the Court of Criminal Appeal on any question of law which they may wish to raise. The substitution of appeal to the Court of Criminal Appeal for the procedure of appeal by Writ of Error cannot have affected the principle laid down in *Re Dunn* (3). If the fact that a prisoner could proceed by Writ of Error was a sufficient reason for refusing to grant a Writ of habeas corpus in 1847 the fact that he can now bring an appeal to the Court of Criminal Appeal on any question of law would be an equally sufficient reason for refusing to grant a Writ of habeas

(1) 10 C.B. (N.S.), 3, 142 E.R. 349.
(2) I.R. 7 C.L. 146.
(3) 5 C.B. 215, 136 E.R. 859.

K.B.D. 1944.

IN RE BEGGS.

BLACK. J.

corpus in 1944. Accordingly if *Re Dunn* (1) is good law the Court should not now grant a Writ of habeas corpus where the effect of granting the Writ would be to review the validity of a sentence imposed by a Superior Court.

So far as I have been able to discover, the authority of *Re Dunn* (1) has never been questioned. It is still quoted as authority in the text books. Almost a century has passed since it was decided. One would imagine that during that period cases must have occurred in which a convicted prisoner has wished to challenge the legality of his sentence. And one can find in the Reports a certain number of instances where the alleged invalidity of a sentence has been raised by Writ of Error or by appeal to the Court of Crown Cases Reserved. But we have not been referred to—nor have I been able to find—any reported case since *Re Dunn* (1) in which it has been sought to challenge the validity of a sentence imposed by a Superior Court in England or in Ireland by applying for a Writ of habeas corpus. In the recent case of *The State* (*Cannon*) *v. Kavanagh* (2), to which reference has been made, one of the grounds upon which Counsel on behalf of the applicant for the Writ of habeas corpus based his argument (at p. 433) was that the Circuit Court before which the applicant was convicted, though a Court of Record, was not a Superior but an Inferior Court. I think we must accept *Re Dunn* (1) as good law and as laying down that the Court will not as a general principle issue the Writ of habeas corpus for the purpose of reviewing the validity of a sentence imposed after conviction by a Superior Court so long as the law provides a method of appeal by which the validity of the sentence can be reviewed and the sentence if necessary set right. The only other observation which I wish to make is that I am, of course, not to be taken as deciding the point raised in this case as a matter going to the jurisdiction of this Court in regard to the issue of Writs of habeas corpus. It is perhaps possible to imagine extraordinary cases in which the Court might find it necessary or

(1) 5 C.B. 215, 136 E.R. 859. (2) [1937] I.R. 428.

proper to intervene on behalf of a prisoner under sentence. But the present is not such a case. It is in my opinion a case falling exactly within the authority of *Re Dunn* (1), and on the authority of that case I agree that the conditional order should be discharged.

BLACK, J.

ANDREWS, L.C.J.

ANDREWS, L.C.J. : Mr. Justice Brown has read my judgment and that of Mr. Justice Black in this matter. He desires me to express his entire concurrence with both these judgments.

Solicitors for the applicant : *Martin H. Turnbull.*
Solicitor for the Crown : *Chief Crown Solicitor.*

J. McC.

(1) 5 C.B. 215, 136 E.R. 859.

K.B.D.
(Matrimonial)
1943.

May, 13.
June 22.
Dec. 20, 21.
1944.
July 20.

MASON v. MASON (Otherwise Pennington).

Decree nisi of nullity of marriage—Remarriage of one of the parties before decree made absolute—English domicil—Residence in Northern Ireland—Nullity suit—Jurisdiction—Effect of decree absolute.

On 10th July, 1932, a ceremony of marriage was celebrated between the respondent and one N. By a decree *nisi* of the High Court of Justice in England made on 10th July, 1934, the marriage was declared null and void by reason of the incapacity of N. to consummate it; this decree was made absolute on 21st January, 1935. On 10th January, 1935, N. being still alive, a ceremony of marriage was celebrated in Scotland between the petitioner and the respondent. In 1940 the respondent obtained employment in Northern Ireland and came to reside there. On 30th December, 1942, the petitioner presented a petition for a declaration that the ceremony of marriage celebrated between her and the respondent was null and void on the ground that the respondent's marriage with N. was still valid and subsisting when he went through the ceremony of marriage with the petitioner and consequently that the latter marriage was bigamous and invalid; and at the time when the petition was presented both parties were resident in Northern Ireland but were domiciled in England.

Held—

(1) That the *bona fide* residence of the parties in Northern Ireland was sufficient to found the jurisdiction of the Court to declare the marriage null and void; but

(2) That the decree absolute in the nullity suit between the respondent and N. was retrospective in effect and so precluded the finding that the respondent was a married man at the date of his marriage to the petitioner on 10th January, 1935;

(3) That the respondent was not under any legal disability preventing him from contracting a valid marriage with the petitioner on 10th January, 1935; and, accordingly,

(4) That the marriage between the petitioner and the respondent was lawful and valid.

Petition dismissed.

Wife's petition for a declaration of nullity of marriage.

The following statement of the material facts is taken from the judgment of the Lord Chief Justice:—Both petitioner and respondent were born in London

of London parents. On 10th July, 1932, the respondent, whose proper name was Christopher Pennington, was married to one Sylvia Frances De Neumann. The validity of this marriage was questioned in nullity proceedings in the English Courts at the instance of the present respondent, who, on 10th July, 1934, obtained a decree *nisi* on the ground of his wife's incapacity to consummate the marriage. This decree *nisi* was made absolute on 21st January, 1935. The marriage of the present petitioner and respondent was solemnized eleven days earlier, namely, on 10th January, 1935, which was precisely six months from the day upon which the decree *nisi* had been granted, the parties obviously being of opinion that it was lawful for them to contract such marriage when the six months period had expired, notwithstanding the fact that the decree absolute had not then been pronounced. This latter ceremony of marriage took place in Dundee, Scotland, where the petitioner had been living for a few months before the marriage. At the time of this ceremony of marriage the respondent's first wife, Sylvia de Neumann, was still alive.

A child was born to the petitioner and respondent at Dundee on 28th March, 1936, after which event the petitioner became and remained an invalid for a period of approximately three years. Ultimately, in the year 1939, the parties proceeded to Torquay where they resided together until the following year, when the respondent obtained an appointment in Northern Ireland. Subsequently they lived together at Portstewart, Dungiven, and Portrush, all in Northern Ireland. Relations became somewhat strained about two years, or a little more, ago, with the result that the respondent left his wife at Portrush and came to Dunmurry, where he had obtained work with a firm of Air Ministry contractors. Apparently, however, up to the date of the hearing of the petition before me, he was in the habit of going at intervals to Portrush, and of spending week ends with the petitioner, though, she declared, not of cohabiting with her as man and wife. She said she could not stop him, as he asserted that he had a right to go whilst he was her husband.

K.B.D. (Matrimonial) 1943.

MASON v. MASON (OTHERWISE PENNINGTON).

The petition was based on the ground that the marriage between the respondent and Sylvia de Neumann was valid and subsisting at the date of his marriage to the petitioner, and consequently that the latter marriage was bigamous and invalid.

Stewart for the petitioner :—

The respondent's first marriage was a voidable marriage but was good until it was annulled by decree absolute. The *bona fide* residence in Northern Ireland of the parties is sufficient to give the Court jurisdiction. [He referred to *Inverclyde v. Inverclyde* (1); *Turner v. Thompson* (2); *Roberts v. Brennan* (3); Latey on Divorce, 12th ed., p. 176; Archbold's *Criminal Evidence, Pleading and Practice*, 27th ed., p. 1304.]

There was no appearance for the respondent and the Court, pursuant to section 11 (1) of the Matrimonial Causes Act (Northern Ireland), 1939, directed the papers to be sent to the Chief Crown Solicitor to have the following questions argued :—

(1) Whether the *bona fide* residence in Northern Ireland of the petitioner and respondent (whose domicil was and still is English and whose marriage was celebrated in Scotland) is sufficient to found the jurisdiction of the Court to make a decree of nullity in this suit ?

(2) Whether the effect of the decree absolute made by Sir Boyd Merriman on the 21st January, 1935, in the nullity suit of *Pennington v. Pennington* (*otherwise Neumann*) was retrospective in character so as to render the marriage between the present petitioner and the present respondent a lawful and valid and not a bigamous marriage ?

MacDermott, A.-G. (with him *Patton*), for the Chief Crown Solicitor :—

This being a nullity suit the jurisdiction of the Court involves consideration of (*a*) the jurisdiction of the Ecclesiastical Courts ; (*b*) the enactments transferring their jurisdiction to the Civil Courts ; and (*c*) the present scope of the transferred jurisdiction.

(1) [1931] P. 29.
(2) [1888] 13 P.D. 37.
(3) [1902] P. 143.

As to (*a*): There was no material difference in the jurisdiction of the Ecclesiastical Courts in England and Ireland regarding matrimonial causes. Though the Law of Citations (23 Hen. VIII, c. 9) did not apply to Ireland it was a declaratory statute and reflects no difference in the basis of jurisdiction. For long prior to their abolition the Ecclesiastical Courts, while refusing to recognise any process for the dissolution of marriage, granted nullity decrees in respect of voidable as well as of void marriages. Their jurisdiction was founded on residence within the diocese of the party cited or accused and the exceptions to this rule enlarged rather than narrowed the jurisdiction. They were the Courts of Christendom and were not concerned with domicil in its modern sense of the legal home. Had the Ecclesiastical Courts of this country retained their jurisdiction their competence to determine this suit would have been undoubted. [He referred to Shelford on *Marriage, Divorce and Registration* (1841); *Cooper v. Cooper* (1), *Graham v. Graham* (2), *Armytage v. Armytage* (3), *Firebrace v. Firebrace* (4), *Niboyet v. Niboyet* (5), and *Anghinelli v. Anghinelli* (6).

As to (*b*): The Ecclesiastical Courts and Registries Act (Ir.), 1864, provided for the consolidation of Ecclesiastical Courts and Registries in Ireland but did not affect the basis of jurisdiction which remained unaltered until these Courts were abolished as from 1st January, 1871, by section 21 of the Irish Church Act, 1869. The Matrimonial Causes (Ireland) Act, 1870, transferred the jurisdiction vested in the Ecclesiastical Courts to the Court for Matrimonial Causes and Matters established by that Act. By section 21 of the Judicature Act (Ireland), 1877, the jurisdiction vested in the Court for Matrimonial Causes and Matters was transferred to the High Court of Justice and by virtue of that Act, the Judicature Act (Ireland), 1897, the Government of Ireland Act, 1920, and the Orders made thereunder the jurisdiction

(1) Milw. (1847) 373.
(2) [1923] P. 31.
(3) [1898] P. 178.
(4) 4 P.D. 63.
(5) 4 P.D. 1.
(6) [1918] P. 247.

K.B.D. (Matrimonial) 1943.

MASON v. MASON (OTHERWISE PENNINGTON).

formerly vested in the Court for Matrimonial Causes and Matters is now vested in and exercisable by this Court. [He referred to the Act of 1870, sections 7 and 13, the Act of 1877, and also to the Matrimonial Causes Act (N.I.), 1939.]

As to (*c*): The jurisdiction so vested in this Court has not been curtailed by Statute or Order. The jurisdiction in nullity suits and other matrimonial causes transferred from the Ecclesiastical Courts remains and is still exercisable by this Court on the basis of residence unless the contrary has been established by authority. There is a divergence of opinion. On the one hand it is said that the doctrine of domicil as the foundation of jurisdiction in suits for dissolution was not developed until after the abolition of the Ecclesiastical Courts and was not settled law until *Le Mesurier v. Le Mesurier* (1); that the basis of that doctrine is that such suits affect status; that suits for a declaration of nullity involve status to a similar degree; and accordingly that domicil should be the test of jurisdiction in nullity suits. In support of this view reliance is placed principally upon (i) the decision in *Salvesen v. Administrator of Austrian Property* (2), and (ii) the decision in *Inverclyde v. Inverclyde* (3). On the other hand it is said that in *Salvesen's case* (2) the House of Lords while holding that the Court of the domicil was competent did not decide that its jurisdiction was exclusive; that in the *Inverclyde case* (3), Bateson, J., misapplied the decision in *Salvesen's case* (2), and was in error in regarding a decree annulling a voidable marriage as in substance a decree for dissolution; that the balance of authority favours residence as a basis of jurisdiction in nullity suits; and that by reason of the manner in which the Ecclesiastical jurisdiction was transferred the Courts cannot now substitute a new basis of jurisdiction without statutory authority. [He referred to *Carden v. Carden* (4); *Bell v. Kennedy* (5); *Udny v. Udny* (6); *Simonin v.*

(1) [1895] A.C. 517.
(2) [1927] A.C. 641.
(3) [1931] P.29.
(4) 1 Curt 558
(5) L.R. 1 Sc. & Div. 307.
(6) L.R. 1 Sc. & Div. 441.

Mallac (1); *Wilson v. Wilson* (2); *Sottomayor v. De Barros* (3); *Niboyet v. Niboyet* (4); *Linke v. Van Aerde* (5); *Johnston v. Cooke* (6); *Roberts v. Brennan* (7); *Sproule v. Hopkins* (8); *Malone's Divorce Bill* (9); *Ogden v. Ogden* (10); *Lord Advocate v. Jaffrey* (11); *A.-G., for Alberta v. Cook* (12); *Herd v. Herd* (13); *Graham v. Graham* (14); *Mitford v. Mitford* (15); *Eustace v. Eustace* (16); *White v. White* (17); *Hussein v. Hussein* (18); *Galene v. Galene* (19); *Easterbrook v. Easterbrook* (20); Rayden on Divorce, 4th Ed., 14 *et seq*; Latey on Divorce, 12th ed., 47 *et seq*; Dicey, *Conflict of Laws*, 5th ed., 295, *et seq*; Westlake on *Private International Law*, 7th ed., 94, *et seq*; Cheshire on *Private International Law*, 2nd ed., 336 *et seq*; Read on *Recognition and Enforcement of Foreign Judgments*, 232, *et seq*; Halsbury's *Laws of England*, 2nd ed., Vol. 6, p. 303.]

Much may be said for making domicil the basis of jurisdiction in nullity suits as in suits for dissolution but, as the law stands, residence still gives jurisdiction in the former class of case. Not only is the trend of recent decision in this direction but it is difficult to see how section 13 of the Matrimonial Causes (Ir.) Act, 1870, can be modified save by legislation or order. A jurisdiction based on residence alone may not be exclusive and decrees made in exercise of such jurisdiction may lack the qualities of judgments *in rem*. But if such a jurisdiction has persisted, the competence of this Court to hear the present petition seems clear.

The petition having been presented after the decree absolute annulling the respondent's first marriage the question arises whether the nature of this decree precludes the finding of bigamy which is the basis of

(1) 2 Sw. & Tr. 67.
(2) 2 P.D. 435.
(3) 2 P.D. 81; 3 P.D. 1.
(4) 3 P.D. 52; 4 P.D. 1.
(5) 10 T.L.R. 426.
(6) [1898] 2 I.R. 130.
(7) [1902] P. 143.
(8) [1903] 2 I.R. 133.
(9) [1905] A.C. 314.
(10) [1908] P. 46.
(11) [1921] 1 A.C. 146.
(12) [1926] A.C. 444.
(13) [1936] P. 205.
(14) [1923] P. 31.
(15) [1923] P. 130.
(16) [1924] P. 45.
(17) [1937] P. 111.
(18) [1938] P. 159.
(19) [1939] P. 237.
(20) 60 T.L.R. 80.

K.B.D. (Matrimonial) 1943.

MASON v. MASON (OTHERWISE PENNINGTON).

the petitioner's claim for relief. The decree absolute was granted by the Court of the domicil. It is in the usual form. It pronounces the marriage between the respondent and his first wife "to be and to have been "absolutely null and void" by reason of such wife's incapacity and it declares that the respondent "was "and is free from all bond of marriage" with her. The retrospective nature of this decree is deliberate and reflects the attitude of the Church to dissolution of marriage. For the Ecclesiastical Courts the rule was "ever or never" and there was no distinction between void and voidable marriage in this respect. If a voidable marriage was annulled it was annulled *ab initio*. The form of decree was considered by the House of Lords in *Lewis v. Hayward* (1). Its retrospective nature is recognised by the provisions to avoid bastardisation of issue contained in section 7 (2) of the Matrimonial Causes Act, 1937, and section 9 (2) of the Matrimonial Causes Act (N.I.), 1939. The difference in this respect between decrees of dissolution and nullity is manifested by the proviso to sec 57 of the Offences against the Person Act, 1861, relating to the offence of bigamy. It does not follow that all transactions prior to a decree of nullity in which either or both of the spouses have been concerned as such can be re-opened or made subject to adjustment once the decree has been pronounced. The decree is not retrospective for every purpose. See *Dodworth v Dale* (2). But whenever the status of the parties is in issue the pronouncement of such a decree by the Court of the domicil is conclusive that there has never been any marriage at all. The petitioner cannot now allege that the respondent was a married man when he married her and the claim founded on bigamy fails. [He also referred to *Soar v. Foster* (3); *Elliott v. Gurr* (4); *A. v. B.* (5); *Norman v. Villars* (6); *Dunbar v. Dunbar* (7); *R. v. Dibdin* (8); *Napier v. Napier* (9);

(1) 35 L.J. (P) 105.
(2) [1936] 2 K.B. 503.
(3) 4 K. & J. 152.
(4) 2 Phill. Ecc. 16.
(5) 1 P. & D. 559.
(6) 2 Ex. D. 359.
(7) [1909] 2 Ch. 639.
(8) [1910] P. 57.
(9) [1915] P. 184.

P. v. P. (1); *In re Wombwell's Settlement* (2); *Newbould v. Attorney-General* (3); and *Adams v. Adams* (4)].

The facts and the second question propounded by the Court raise a further point of general importance: Was the petitioner's marriage valid though not bigamous? It took place before the respondent obtained his decree absolute. The interval was short but nothing can turn on its length. The respondent was not then free in law to marry again. His status had not been altered by the decree *nisi*. His first marriage being but voidable was good in the eyes of the world. No one could then challenge it but himself and the steps he had taken for that purpose had not resulted in a final adjudication. In considering his capacity to remarry the crucial date is that of the second ceremony. It would appear that had he been tried for bigamy before the pronouncement of the decree absolute his first marriage though voidable would have sufficed to warrant a conviction. See *B alias A. v. B.* (5), at 608, and Archbold, 24th ed., 1298. *Fender v. St. John-Mildmay* (6), related to a promise to marry made prior to decree absolute in a suit for dissolution but neither the decision nor the reasoning on which it was based goes the length of suggesting that the marriage of the parties to the promise would have been valid if celebrated before the final decree. Here, if the respondent's second marriage was lawful when celebrated the subsequent decree absolute would not affect it and it might have been equally lawful if celebrated before the decree *nisi*. No authority directly in point has been found but if, as is submitted for the consideration of the Court, the respondentwas in law incapable of marrying again before the decree absolute, the petitioner, if accorded liberty to amend, may be entitled to relief on this ground. [He also referred to *Siveyer v. Allison* (7) and *Fowke v. Fowke* (8).]

Cur. adv. vult.

(1) [1916] 2 I.R. 400.
(2) [1922] 2 Ch. 298.
(3) [1931] P. 75.
(4) [1941] 1 K.B. 536.
(5) 27 L.R.Ir. 587.
(6) [1938] A.C. 1.
(7) [1935] 2 K.B. 403.
(8) [1938] Ch. 774.

K.B.D. (Matrimonial) 1943.

MASON v. MASON (OTHERWISE PENNINGTON).

ANDREWS, L.C.J.

ANDREWS, L.C.J.: This is a wife's undefended petition for nullity which, as originally filed, was grounded solely upon the alleged bigamous character of the marriage between the petitioner and the respondent.

[Having stated the facts his Lordship proceeded :—]

The first question to be determined, upon which, through the Chief Crown Solicitor, I invited the assistance of the learned Attorney-General, is whether the *bona fide* residence of the petitioner and respondent in Northern Ireland for a period of approximately three years before the hearing is sufficient, without a change of domicil, to found the jurisdiction of the Court to make a decree of nullity in this suit. I refer to it as a "*bona fide* residence," for I have no hesitation in holding that the parties' residence in Northern Ireland resulted from the respondent's employment, and not from any mere desire on the part of either spouse to attract the jurisdiction of this Court. The domicil of the parties was and is English.

Any question which affects the jurisdiction of our Courts is from its very nature one of importance ; and the issue before me in the present case is, in addition, one of considerable difficulty owing to the divergence of opinion which has manifested itself in the works of the leading text-book writers and also in certain reported cases. Two conflicting views have been advanced, and each has received a certain measure of support. One school of thought holds that, as a decree of nullity affects status and, accordingly, is in the nature of a judgment *in rem*, the Court of the domicil alone has jurisdiction to entertain a nullity suit. Its adherents contend that such cases of the highest authority as *Bell v. Kennedy* (1), at p. 320, and *Udny v. Udny* (2), at p. 457, have long since established the nexus between domicil and civil status, the former being in fact the criterion established by law for the purpose of determining the latter. The other school considers that, whatever other basis of jurisdiction there may be, mere residence may be sufficient to confer jurisdiction, provided that it is a *bona fide*

(1) L.R. 1 Sc. & Div. 307. (2) L.R. 1 Sc. & Div. 441.

residence—not one assumed merely for the purpose of suit.

These divergent views appear to me to arise from one or more of three possible causes :—

(1) A failure sometimes to appreciate the two-fold jurisdiction of the Matrimonial Court arising (*a*) from the transfer effected by legislation from the Ecclesiastical Courts, and (*b*) from other statutory enactment ;

(2) A confusion of thought between, on the one hand, the existence of a jurisdiction which is exercised by our Courts and which is at least binding and decisive within the jurisdiction, and, on the other hand, a jurisdiction which, when exercised, results in the making of such a decree as, by the comity of nations, is recognised by the law of all civilised States ; and

(3) A confusion between the law relating to divorce, which is the dissolution of a valid marriage, and the law relating to nullity, in which the Court declares a marriage, which from the beginning was either void or voidable, to be and to have been absolutely null and void. A suit for divorce is for the disruption of the marriage bond ; whilst a nullity suit is based on the assertion that there never was a marriage bond at all.

In Ireland, as in England, the law in regard to matrimonial disputes was formerly administered exclusively by the Ecclesiastical Courts, at one time by Church dignitaries, and afterwards under delegated powers by ecclesiastical lawyers. Their jurisdiction extended to divorces *a mensa et thoro*, suits for nullity of marriage, for restitution of conjugal rights and for jactitation of marriage. They exercised no jurisdiction for the dissolution of marriage, for the Church regarded it as indissoluble ; a divorce *a vinculo* was a matter for Parliament. They acted *in personam*. Their jurisdiction was founded on the residence of the respondent—a residence within the diocese in which the Court was held. They were restricted by the common law to their prescribed area of operation ; and the

K.B.D. (Matrimonial) 1943.

MASON v. MASON (OTHERWISE PENNINGTON).

ANDREWS, L.C.J.

Statute of Citations 1531-2 (23 Henry VIII, c. 9), which enacted that no manner of person should be cited or summoned to appear before any judge spiritual out of the diocese or peculiar jurisdiction where the person so cited or summoned should be *inhabiting* and *dwelling* at the time of awarding or giving forth the citation or summons, was itself merely declaratory, or, as Dr. Lushington expressed it in *Collett v. Collett* (1), was passed in affirmance of the common law. As such declaratory legislation, although the Statute applied only to England, it did not effect any difference of procedure or of jurisdiction between the Ecclesiastical Courts of that country and those of Ireland.

The first reported case to which I would call attention on the subject of the jurisdiction of the Ecclesiastical Courts is *Carden v. Carden* (1837) (2). In referring to this case Swinfen Eady, M.R., in his judgment in *Anghinelli v. Anghinelli* (3), said that it appeared from the judgment what the court was considering was the question of residence and not domicil, and that it was residence within the diocese before the issue of the citation which gave the court jurisdiction.

I would also refer to *Cooper v. Cooper* (4), a suit for restitution of conjugal rights which clearly recognises that jurisdiction in all matrimonial cases in the Ecclesiastical Courts was based on residence. The place where a person dwells is the place to which he is cited.

I do not propose to refer to further authority in support of a proposition which, in my opinion, does not admit of doubt. I pass to the legislation which effected a transfer of the jurisdiction of these Ecclesiastical Courts to the High Court. The Ecclesiastical Courts and Registries Act (Ireland), 1864, effected a union of the Consistorial or Diocesan Courts and Registries in Ireland into twelve united Diocesan Courts and twelve united Diocesan Registries. The basis of jurisdiction remained unaffected ; but in 1869 the Irish Church Act was passed into law dissolving as from 1st January, 1871, the union of the Churches

(1) 3 Curt. 726, 729.
(2) 1 Curt. 558.
(3) [1918] P. 247, 254.
(4) Milw. (1847) 373.

of England and Ireland, and declaring that the Church of Ireland should cease to be established by law. By section 21 it was provided that on and after 1st January, 1871, all jurisdiction of all the ecclesiastical and other courts therein referred to should cease, that the Act of 1864 should be repealed, and that the ecclesiastical law of Ireland, except in so far as relates to matrimonial causes and matters, should cease to exist as law. Next, there was passed in the following year the Matrimonial Causes and Marriage Law (Ireland) Amendment Act, 1870, which by section 5 provided that all pending suits in any ecclesiastical court in Ireland should be transferred to, dealt with, and decided by the Court for Matrimonial Causes and Matters. Further, by section 7 of the same Act it was enacted that from and after 1st January, 1871, all jurisdiction vested in or exercisable by any ecclesiastical court in respect of divorces *a mensa et thoro*, suits of nullity of marriage, suits for restitution of conjugal rights or jactitation of marriage should belong to and be vested in Her Majesty, and such jurisdiction should be exercised in the name of Her Majesty in a Court of record to be called the Court for Matrimonial Causes and Matters. The last mentioned section 7 of the Irish Act of 1870 corresponds to section 6 of the English Matrimonial Causes Act, 1857. Again, by section 13 of the Irish Act of 1870 (corresponding to section 22 of the English Act of 1857) it was provided that in all suits and proceedings the said Court for Matrimonial Causes and Matters should proceed and act and give relief on principles and rules which, in the opinion of the said Court, should be as nearly as may be conformable to the principles and rules on which the ecclesiastical courts of Ireland had theretofore acted and given relief.

Since the Act of 1870 changes have been effected, by the Judicature Acts of 1877 and 1897, and the Matrimonial Causes Act (Northern Ireland), 1939, in regard to the Court exercising matrimonial jurisdiction —a jurisdiction which was of course much extended by this last Act ; but sections 7 and 13 of the Act of 1870 remain unrepealed ; and, accordingly, the juris-

K.B.D. (Matrimonial) 1943.

MASON v. MASON (OTHERWISE PENNINGTON).

ANDREWS, L.C.J.

diction and the principles of relief formerly exercised and acted upon by the Ecclesiastical Courts in Ireland are now exercisable by and should be acted upon by this Court as part of the High Court of Northern Ireland. This view, I may add, is strengthened by the express terms of section 26 of the Judicature Act (Ireland), 1877 (corresponding to section 23 of the English Judicature Act of 1873), by which all jurisdiction by the Act transferred to the High Court was expressly preserved.

In substance therefore there is no material difference in the legislation which effected the transfer of the matrimonial jurisdiction of the Ecclesiastical Courts in the two countries to their respective High Courts; and in neither country has any legislative enactment restricted or limited its scope or curtailed the basis of relief.

At this stage I would point out that I am only concerned with the issue as to the sufficiency of the residence of both parties as a test of jurisdiction in a nullity suit. I am in no sense inquiring into whether such residence is the sole criterion of jurisdiction. There is, indeed, much authority to show that it is not; and that either domicil, or in certain nullity cases the fact that the marriage was celebrated within the country, is sufficient to confer jurisdiction. The Irish case of *Sproule v. Hopkins* (1), may be referred to in this connection. It is no concern of mine to question such authority here, nor have I any desire to do so. It is my duty, however, to examine some of the more important cases bearing upon what, for the sake of brevity, may be referred to as a residential jurisdiction.

Niboyet v. Niboyet (2) was a case not of nullity but of divorce. It calls, however, for some notice on account of the frequent references made to it in subsequent cases. The Court of Appeal, by a majority consisting of James and Cotton, L.JJ. (Brett, L.J., dissenting), reversed the decision of Sir R. J. Phillimore and held that the Court had jurisdiction to grant a decree to the wife where the marriage had been

(1) [1903] 2 I.R. 133. (2) 4 P.D. 1.

solemnized at Gibraltar between a Frenchman and an Englishwoman. The husband's domicil was and remained French, but he had resided for several years in England. The majority decision so arrived at was based upon the jurisdiction formerly exercised by the Ecclesiastical Courts in cases which they had authority to decide. Thus (at p. 22) Cotton, L.J., says: "Moreover the Diocesan Courts, whose juris- "diction is vested in the Court of Divorce, looked "to the residence not to the domicil of the respondent "for the purpose of deciding whether a suit could be "entertained; and I see no reason for supposing that "an Ecclesiastical Court, acting *pro salute animae*, "would have declined to interfere against an offending "husband or wife in respect of an act committed "within the local limits of its jurisdiction, because the "parties, though resident within those limits, were "domiciled elsewhere. . . . My opinion is that under "the circumstances of this case the Court of Divorce "has jurisdiction to entertain a petition for judicial "separation against the respondent. If so, has it "under section 27" (*i.e.*, of the Matrimonial Causes Act, 1857) "jurisdiction to entertain a petition for dissolu- "tion of marriage? In my opinion it has."

That this decision went too far in applying a residential test of jurisdiction to suits for divorce or dissolution of marriage does not now admit of doubt. The matter was considered by the Privy Council in the case of *Le Mesurier v. Le Mesurier* (1), where it was held in a case which came on appeal from Ceylon that the permanent domicil of the spouses within the territory is necessary to give to its Courts jurisdiction so to divorce *a vinculo* as that its decree to that effect shall by the general law of nations possess extra-territorial authority. A so-called "matrimonial "domicil," said to be created by a *bona-fide* residence of the spouses within the territory, of a less degree of permanence than is required to fix their true domicil, cannot be recognised as creating such jurisdiction. In the course of his judgment Lord Watson referring to *Niboyet v. Niboyet* (2) said (at p. 531) that the main

(1) [1895] A.C. 517. (2) 4 P.D. 1.

K.B.D. (Matrimonial) 1943.

MASON v. MASON (OTHERWISE PENNINGTON).

ANDREWS, L.C.J.

reason for the decision was that before the Act of 1857 became law the petitioner would have been entitled to sue her husband in the Bishop's Court, although he was not domiciled in England, and to ask either for restitution of conjugal rights or for a divorce *a mensa et thoro*, and in either case for permanent alimony; and, consequently, that after the Act of 1857 passed, jurisdiction in divorce might be exercised in the same circumstances. "There appears to their Lordships," he said, "to be an obvious fallacy in that reasoning. "It is not doubtful that there may be residence without "domicil sufficient to sustain a suit for restitution of "conjugal rights, for separation, or for aliment"; (or, I would add, for nullity); "but it does not follow "that such residence must also give jurisdiction to "dissolve the marriage. Their Lordships cannot con- "strue section 27 of the Act of 1857 as giving the "English Court divorce jurisdiction in all cases where "any other matrimonial suit would previously have been "entertained in the Bishop's Court." After further examination of authority Lord Watson expressed the conclusion (at p. 540) that "according to international "law the domicil for the time being of the married "pair affords the only true test of jurisdiction to "dissolve their marriage."

The relevancy of these authorities—both of them suits for divorce—becomes more apparent when one considers the judgment of Jeune, P., in *Roberts v. Brennan* (1), which was a suit by the wife for a declaration that the ceremony of marriage which she went through with the respondent in the Isle of Man was null and void on the ground that, as she had since learnt, it was a bigamous marriage. The respondent was domiciled in Ireland where he was served with the citation; but the parties had lived together in the Isle of Man and in England and Scotland. The suit was undefended. For the petitioner, it was contended that residence was sufficient to found jurisdiction in suits for nullity, and the old case of *Hanford v. Morris* (1776) (2), was cited as authority for the submission that the Ecclesiastical Courts would have entertained such a

(1) [1902] P. 143. (2) 2 Hag. Con. 423.

petition, and reference was also made to the relevant sections, to which I have already called attention, of the Matrimonial Causes Act, 1857. The judgment of Jeune, P., though brief, is direct. "Although," he says, "*Niboyet v. Niboyet* (1), is now of discredited "authority as applied to suits for dissolution of "marriage, the judgment in that case in the Court of "Appeal still applies in such a case as this. In my "view, residence—not domicil—is the test of juris- "diction in a nullity case. The jurisdiction of the "Ecclesiastical Courts was based on the residence of "the parties, and in suits for nullity this Court follows "the practice of the Ecclesiastical Courts, as prescribed "by section 22 of the Matrimonial Causes Act, 1857." This decision may, in my opinion, justly be commented on, as it was by Horridge, J., in *Graham v. Graham* (2) (at p. 37), upon the ground of insufficiency of evidence of the residence of the parties in England; but I regard the statement of the law in regard to jurisdiction as both clear and accurate.

The next case to which I feel it necessary to refer, and which has the authority of the English Court of Appeal, consisting of Swinfen Eady, M.R., and Warrington and Duke, L.JJ., to support it, is *Anghinelli v. Anghinelli* (3)—a suit for judicial separation brought by a wife, who before her marriage had been a domiciled Englishwoman, against her husband whose domicil was alleged to be Italian. At the commencement of the suit both parties were resident within the jurisdiction. The case is of interest because of its references to the jurisdiction formerly exercised by the Ecclesiastical Courts and its legislative transfer. The effect of the relevant sections Swinfen Eady, M.R. (at p. 252) declares to be to transfer to the Divorce Court the jurisdiction formerly exercised by the Ecclesiastical Courts, and to require that Court in all suits and proceedings other than those for dissolution of marriage to act upon the same principles and rules as did the Ecclesiastical Courts. "Therefore," he continues, "the "only question which arises on this appeal is whether

(1) 4 P.D. 1.
(2) [1923] P. 31.
(3) [1918] P. 247.

K.B.D. (Matrimonial) 1943.

MASON v. MASON (OTHERWISE PENNINGTON).

ANDREWS, L.C.J.

"before the Act of 1857 the Ecclesiastical Courts "would have allowed to be maintained a suit for "divorce *a mensa et thoro* where the parties were "resident here but domiciled abroad. The authorities "clearly establish that they would; and they even "go further and hold that where the parties are "domiciled abroad and the offences complained of "are committed abroad, but the parties have since "come to reside in this country, the Court may give "this relief." To the like effect is the judgment of Warrington, L.J., who (at p. 256) says :—"No attempt "is here made to controvert the statements made by "James, L.J., and Lord Watson as to the rule of the "Ecclesiastical Courts and those statements must be "accepted as accurate statements of the law and "practice. If that be so, then there is an end of the "case, because it follows that the jurisdiction of the "Court is the jurisdiction previously exercised by the "Ecclesiastical Courts, and must follow the principles "and rules on which those Courts acted."

Graham v. Graham (1)—a decision of Horridge, J.—was a suit not for nullity but for judicial separation which is now substituted for the divorce *a mensa et thoro* of the Ecclesiastical Courts. Following *Armytage v. Armytage* (2), and *Anghinelli v. Anghinelli* (3), it was held that such a suit could be entertained where both parties were resident, though not domiciled, within the jurisdiction. The decision would, in my opinion, have been the same had the proceedings been for nullity. The jurisdiction exercised was that formerly possessed by the Ecclesiastical Courts.

The same volume contains the report of *Mitford v. Mitford* (4). This was a husband's petition for divorce, on the ground of his wife's bigamy and adultery, in which the decree of a foreign Court was held open to examination; but it was established that when that Court has jurisdiction over the subject-matter and the parties, and has proceeded in accordance with what in English law are deemed to be the requirements of natural justice, its judgment as to the nullity of a

(1) [1923] P. 31.
(2) [1898] P. 178.
(3) [1918] P. 247.
(4) [1923] P. 130.

marriage seems to be as conclusive as a like judgment in any other civil proceeding. If the foreign court has jurisdiction in this sense the English Courts do not inquire whether the jurisdiction is properly exercised. I refer particularly to this case, however, because of certain passages in the judgment of the President (Sir Henry Duke) at p. 135, where he says that it was not disputed that the Courts duly authorised by any State may determine the validity of the marriage of persons resident within and subject to their jurisdiction. "The law of England," he asserts, "is, I "think, clear to the effect that they may." "This "Court," he continues, "by virtue of the jurisdiction "conferred by the Matrimonial Causes Act, 1857, "section 6, is empowered to adjudicate upon an "allegation of nullity of marriage in the case of persons "within its jurisdiction and to pronounce finally "thereon by a decree which concludes the matter "between the parties here, and would, I think, be "received in evidence elsewhere." He then cites in support of his opinion the passage which I have quoted from the judgment in *Roberts v. Brennan* (1).

At this stage a long line of consistent authority, from which I have made what appears to me to be an appropriate selection, is interrupted by the decision or rather by certain *dicta* of the Law Lords in *Salvesen or Von Lorang v. Administrator of Austrian Property* (2). The appellant, formerly Miss Salvesen, was a British subject domiciled in Scotland who went through a form of marriage in Paris with Herr von Lorang, an Austrian subject. The parties settled in Wiesbaden where they continued to live except during a period covered for the most part by the 1914-18 War. In 1923 the respondent claimed the movable property of the appellant in Scotland on the ground that she became an Austrian national by her marriage. The holders of the movable property brought an action of multiple poinding (a Scotch interpleader proceeding) to have it determined who was entitled to the property. The property was claimed by the respondent and also by the appellant who averred that she had recently

(1) [1902] P. 143. (2) [1927] A.C. 641.

K.B.D. (Matrimonial) 1943.

MASON v. MASON (OTHERWISE PENNINGTON).

ANDREWS, L.C.J.

discovered that her marriage in Paris was null and void because certain formalities required by the law of France had not been observed, and who further intimated that she intended to bring a suit of nullity of marriage in Wiesbaden, the Court of the domicil of Herr von Lorang and herself. The nullity suit was brought, and the Court of Wiesbaden declared the marriage null and void. The question for determination was whether the decree of the German Court should be held binding on the Scottish Courts, and this question the House of Lords decided in the affirmative. Wiesbaden, it was held, had become the place of their domicil; and, as Viscount Haldane expresses it (at p. 652):—"The real question is simply whether the "Court of the domicil was competent to dispose "conclusively and finally of the question before it. "If so, it does not matter in law whether it had an "exclusive jurisdiction." He proceeds to say that had the question been one of divorce for adultery there could have been no controversy as to the binding effect of the German decree. The status of married persons as dependent on divorce is a matter for which the Court of their domicil is the appropriate Court, and its decision is treated by our Courts as not only being valid but as conclusive. Such jurisdiction, he declares, (at p. 654) ought on principle to be regarded as exclusive.

It is impossible in the limitations which I must impose upon myself to do full justice to *Salvesen's case* (1), in this judgment. Much of the speeches of the learned Law Lords is devoted to the line of thought that a nullity decree alters the status of the husband and wife; that the status must be taken to have been a *res*; and that the judgment was therefore *in rem*. "Celibacy," says Viscount Dunedin (at p. 662), "is "just as much a status as marriage . . . The judg- "ment in a nullity case decrees either a status of "marriage or a status of celibacy." The portion of the report, however, to which I wish to call special attention, because of its consequences to which I shall later refer, is a passage in the speech of Lord Phillimore (at p.

(1) [1927] A.C. 641.

671) :—" Finally, my Lords," he says, " if the Court " is a competent Court, still more if it is the only " competent Court—*and in my opinion the Wiesbaden " Court was the only competent Court for these parties*" (the italics are mine)—" its judgment must, for the " very reason of the thing, be such a judgment " as that described in *A. v. B.* (1), a ' definitive " ' decree declaring a marriage void which should be " ' universally binding and which should ascertain and " ' determine the status of the parties once for all.' "

" In my opinion the Wiesbaden Court was the only " competent Court for these parties." What do these words mean ? Are they to be generalised into a principle that the domicil of the parties affords an exclusive jurisdiction in nullity suits—that the Court of the domicil is the only Court which is competent to pronounce a nullity decree ? So construing these words when taken by themselves, the editors of the 4th Edit. of *Rayden on Divorce* in a passage at p. 15, to which the learned Attorney General called my attention, suggest that if Lord Phillimore's speech is taken as a whole it shows that the real meaning of the *obiter dictum* (which, as I shall show, was particularly relied upon by Bateson, J., as precisely in point in *Inverclyde* (*otherwise Tripp*) *v. Inverclyde* (2),) is that the Court of the domicil has a superior claim in questions of status to other Courts, and is therefore the only Court competent to pronounce a decree which is conclusive everywhere, and not that the jurisdiction of the Court of the domicil is exclusive of all other Courts.

The editors regard it as " scarcely conceivable that " Lord Phillimore by such a dictum contemplated " that he was sweeping aside the anterior authorities " and was denying the existence of a concurrent " jurisdiction of the English Court in such cases. It is " indisputable," they assert, " that the jurisdiction in " nullity suits is a jurisdiction in which by statute " are embodied the principles on which the Ecclesi- " astical Courts had given relief." Apart from the dictum of Lord Phillimore, they conclude, nowhere

(1) L.R. 1 P. & M. 559. (2) [1931] P. 29.

K.B.D. (Matrimonial) 1943.

MASON v. MASON (OTHERWISE PENNINGTON).

ANDREWS, L.C.J.

in *Salvesen's case* (1), was it suggested that there could be no jurisdiction concurrent with that of the domicil, nor was it suggested that jurisdiction in suits for nullity in the English Courts is dependent upon the ground upon which the decree of nullity is sought. Thus, in an endeavour to defend their use, the editors seek to place an interpretation on Lord Phillimore's words which I scarcely think they naturally bear. For my own part I would prefer to interpret them as purely parenthetical words, expressly referring only to the judgment of the Wiesbaden Court, and not intended to be generalised into a principle at variance with the long chain of authority to which I have referred. It may well be that in the circumstances of the case as proved there was no such evidence of a "matrimonial home," or of a residence of both parties or even of the husband himself, as would have been requisite to found the jurisdiction of the Ecclesiastical Courts. If one or other of these explanations cannot be accepted it seems to me that Lord Phillimore's words, which were obviously *obiter* and, accordingly, not of a binding character, must be regarded as at variance with settled principle and authority.

Salvesen's case (1) was followed by *Inverclyde* (*otherwise Tripp*) *v. Inverclyde* (2), to which I have already referred. Following the dicta in *Salvesen's case*, (1) Bateson, J., held that a decree annulling a marriage on the ground of impotence is a judgment *in rem* altering the status of the parties, and that it can be pronounced only by the Court of their domicil. Such a decree, he points out, deals with a marriage which till the date of the decree is voidable only and not void. In essence, it is a decree for the dissolution of marriage, and is thus distinguished from decrees annulling marriages for illegality or informality. I find it difficult to appreciate this latter proposition on legal or historical grounds. The distinction in jurisdiction which Bateson, J., thus seeks to make between suits for nullity of void and voidable marriages is, as stated in *Rayden* (at p. 15), not to be found in the Matrimonial Causes Acts nor in the principles of the ecclesiastical

(1) [1927] A.C. 641. (2) [1931] P. 29.

law, and the case has since been criticised on this ground; but, whether the decision be sound or unsound, it does not affect the present case in which the decree is sought, not as a voidable marriage on the ground of impotency, but as a void marriage on the ground that it was bigamously contracted. On this point I would only refer to Bateson, J's., own words where (at p. 48) he said:—"In truth bigamy cases "help very little, as in them as distinct from this (*i.e.*, "an impotence case) there never has been a marriage, "and the argument that there is no distinction or "difference between the two classes of cases seems to "me untenable."

Since *Inverclyde v. Inverclyde* (1), the pendulum appears to me to have swung back somewhat in favour of a residential jurisdiction—perhaps, as sometimes happens in such circumstances, it may be said to have swung a little too far. Thus in *White v. White* (2), Bucknill, J., granted a decree *nisi* in nullity of a form of marriage contracted in Australia on the ground of the respondent's bigamy. The woman petitioner was domiciled and resident in England, whilst the respondent was domiciled either in Malta, his domicil of origin, or in Australia, his domicil of choice, and had never resided in England. The respondent had not, however, entered an appearance or taken any other part in the proceedings. In the circumstances not much importance can be attached to the decision, especially having regard to the learned Judge's statement (at p. 125) that, if the respondent had entered an appearance to the petition under protest against the exercise of jurisdiction, he should have had serious doubts whether the Court had jurisdiction over the matter. The respondent by his conduct and admissions had, in his opinion, so acted as to justify the Court in exercising jurisdiction; and under the "special circum-"stances" of the case and to avoid hardship he made the decree.

In *Hussein v. Hussein* (3), where a woman petitioned for nullity of marriage on the ground of duress and

(1) [1931] p. 29.
(2) [1937] P. 111.
(3) [1938] P. 159.

K.B.D. (Matrimonial) 1943.

MASON v. MASON (OTHERWISE PENNINGTON).

ANDREWS, L.C.J.

her *de facto* husband was domiciled at the time of the institution of the suit in Egypt, the Court exercised jurisdiction. It appears that the ceremony of marriage was performed at Brentford, and this may have been the ground of the decision; but Henn Collins, J. (as reported) did not state his reason for holding jurisdiction to be established, and the case is therefore of little value.

Finally, I come to *Easterbrook v. Easterbrook* (1), in which Hodson, J., held that the Court had jurisdiction in a nullity suit where the petitioner, a private soldier serving with the Canadian Forces, sought relief on the ground of wilful refusal to consummate the marriage. The petitioner was domiciled in Canada, and the respondent was alleged in the petition to be domiciled in England. The ceremony of marriage took place in England where both parties were subsequently resident. Counsel's submission was based on the old residential jurisdiction of the Ecclesiastical Courts, and the *Inverclyde* (2), *Salvesen* (3) and *White v. White* (4) cases were all cited. Again, as in *White v. White* (4), there was no appearance for the respondent, and no protest to the jurisdiction. The learned Judge expressed his inability to see the distinction for the purpose of jurisdiction which Bateson, J., drew in *Inverclyde v. Inverclyde* (2), between voidable and void marriages; and expressed the view that on the facts of the case he had jurisdiction, as there was held to be in *White v. White* (4), to pronounce a decree.

I have felt it right to refer to these cases which have followed *Inverclyde v. Inverclyde* (2); but, as they are all decisions in suits in which weight was given by the Court to the fact that the respondent did not appear and did not protest to the jurisdiction, or in which there were expressed to be circumstances of special hardship, I do not regard them as possessing the same authority as they would otherwise have done. I prefer rather to base my judgment in the present case on the practice, procedure and jurisdiction which have come down to our Court from the old Ecclesiastical Courts.

(1) [1944] P. 10.
(2) [1931] P. 29.
(3) [1927] A.C. 641.
(4) [1937] P. 111.

The learned Attorney-General, who favoured the existence of a residential jurisdiction, also cited to me passages from several of the leading text-books on the subject. I have already referred to *Rayden* where the view is expressed that jurisdiction may be based on domicil, on the place of celebration of the marriage, and on the *bona fide* residence of the respondent, and in some cases of the petitioner only, in England. At p. 17 it is written that it certainly seems just and convenient that a person who is *bona fide* resident in England should be able to have it determined by the English Court whether he or she is married or unmarried under English law. It may be that a decree pronounced by a Court other than the Court of the domicil is not necessarily decisive of the validity or nullity of a marriage outside the jurisdiction in which it is made, but such a decree should have a decisive effect within the jurisdiction. The paragraph ends with the words that the jurisdiction in nullity suits is a matter of dispute among writers on International Law, referring, in particular, to Westlake and Dicey; "but a tidy solution of that dispute," it is despondently added, "seems to be scarcely possible, and is perhaps "undesirable."

In *Cheshire's Private International Law*, 2nd Edit., at pp. 337-9, emphasis is laid upon the distinction between the annulment of a voidable marriage and one that is void *ab initio*. In the former case it is said that, affecting status, the suit must stand on the same footing as a suit for divorce, and that it becomes subject to the exclusive jurisdiction of the Court of the domicil. In the latter case it is submitted that the Court of the domicil possesses jurisdiction, though not an exclusive jurisdiction, to annul a void marriage. So also, it is contended, the Courts of the *locus celebrationis* must be competent, though perhaps not exclusively so, to decide whether the requisite formalities for a valid marriage were observed. The same would appear to be true of suits founded upon bigamy or fundamental mistake; but where annulment is sought on the ground of incapacity in either party there is no reason why the Courts of the *locus*

K.B.D. (Matrimonial) 1943.

MASON v. MASON (OTHERWISE PENNINGTON).

ANDREWS, L.C.J.

celebrationis should be competent to try the issue unless the incapacity is one that the *lex loci celebrationis* itself regards as an impediment to the marriage. Finally, the strong line is taken, with which I am unable to concur, that residence does not suffice to confer jurisdiction in the case of a void marriage. This view is in direct conflict with Dicey's. No doubt there is a recognition of the weight of the argument to which I have referred in the earlier pages of this judgment derived from the fact that the Ecclesiastical Courts, to whose jurisdiction and principles the High Court have succeeded, constantly entertained suits for nullity in respect of void marriages where the respondent was resident in the diocese at the time of the suit; but this argument is dismissed with the thought that the doctrine which confines all questions of status to the Courts of the domicil is of comparatively recent growth. This is a summary method of disposing of a statutory jurisdiction, and to me it is quite unconvincing. It may be that the law would be more acceptable to the jurists, and that it would be more certain, though perhaps in some ways less convenient, if domicil were made the sole test of jurisdiction in nullity as in divorce; but in my opinion that day has not yet arrived; and when it does come the change—for change I believe it to be—should be effected by clear and unmistakable legislation. It is the duty of this Court to administer the law, not to make it. The same observation might with reason be applied to certain passages cited to me by the Attorney-General contained in the Article upon Jurisdiction on Nullity of Marriage contained in Professor Read's *Treatise on Recognition and Enforcement of Foreign Judgments*, in which, whilst not accepting as, at any rate, important the distinction made in the *Inverclyde case* (1), between marriages void *ab initio* and those which are merely voidable, the author speaks of the problem of jurisdiction to decree nullity of marriage as being in the state of confusion characteristic of an elementary stage of development. He is obviously, however, in whole-hearted sympathy

(1) [1931] P. 29.

with the principle of a jurisdiction based on domicil rather than upon a jurisdiction based on the mere residence of one or both of the parties.

The problems to which I have referred are problems of varied character and of great importance upon which one might be tempted to dwell even longer than I have done ; but I must be careful not to express opinions upon issues which are not really before me, and which are not necessary for the determination of this case. Such matters must await determination when the facts arise which warrant a decision, or when, as one would wish it, Parliament intervenes by legislation which in clear and unmistakable language would remove doubts, and at the same time remove the slur upon our legal system of the present confused state of the law. Suffice it for me to say for the purposes of the present case that, in my opinion, the *bona fide* residence in Northern Ireland of both petitioner and respondent for some years prior to the institution of suit confers upon this Court a jurisdiction to determine the validity or invalidity of the alleged bigamous marriage. This jurisdiction, when called upon to do so, it is my duty to exercise, expressly refraining, as outside my province, from expressing any opinion in regard to the measure of acceptance which my decision may be entitled to receive in other countries which possess their own different legal systems and jurisdictions. In this connection I would merely refer to *Sinclair v. Sinclair* (1), in which Sir William Scott (at p. 297) said :—" I think the con- " clusion is carried too far when it is said that a " sentence of nullity of marriage is necessarily and " universally binding on other countries."

The second question to be determined is whether the decree absolute made by Sir Boyd Merriman on 21st January, 1935, in the nullity suit of *Pennington v. Pennington* (*otherwise Neumann*) was retrospective in character to the extent of rendering the marriage between the present petitioner and the present respondent a lawful and valid and not a bigamous marriage. This question appeared to me to cover

(1) 1 Hag. Cons. 294.

K.B.D. (Matrimonial) 1943.

MASON v. MASON (OTHERWISE PENNINGTON).

ANDREWS, L.C.J.

adequately the issue raised in the Petition; but the Attorney-General's research led him to the conclusion that the facts of the case might have warranted reliance by the petitioner upon another ground for a decree in addition to the alleged bigamous character of the marriage between the petitioner and the respondent which she pleaded, namely, that the respondent was not legally capable of marrying the petitioner until after the annulment of his previous marriage. He suggested that until then the respondent was under a legal disability which effectually prevented him from entering into a valid contract of marriage. I hope that I am doing no injustice to the learned Attorney-General when I say that this submission was made tentatively rather than in a spirit of confidence or conviction. The petitioner, he said, at the conclusion of his argument, "*may* be entitled to relief on this "ground." In order to regularise the raising and determining of this issue, I granted an amendment of the petition by adding thereto the following paragraph :—

> "7. That the said marriage which took place "on the 10th day of July, 1932, was a voidable "marriage by reason of the incapacity of the said "Sylvia Pennington to consummate the same, "and the said marriage was not annulled by a "Court of competent jurisdiction until the 21st "day of January, 1935, and the Respondent was "during the said period, viz., from the 10th day "of July, 1932, until the 21st day of January, "1935, incapable of contracting a valid marriage "with your Petitioner;"

but, having regard to the opinion which I have formed upon it, I have not considered it necessary to give any direction in regard to the re-service of the petition.

These two questions—the one of alleged bigamous marriage and the other of alleged disability to contract —involve the necessity for a careful consideration of the nature and effect of a nullity decree granted, as was the decree of 21st January, 1935, on the ground of impotence. This subject has been very fully discussed in a mass of authority, the greater portion

of which was cited to me by the Attorney-General. Jurisdiction in cases of nullity of marriage was, as I have already mentioned, formerly exercised in Ireland, as in England, by the Ecclesiastical Courts ; and until the passing of the recent Matrimonial Causes Act (Northern Ireland), 1939, the jurisdiction of the competent Irish Matrimonial Court was limited to that exercised before the disestablishment of the Irish Church by such Irish Ecclesiastical Courts. These Courts did not dissolve a marriage ; they only declared that there had been no marriage at all. It was in this way, and in this way only, that an Irish Court could make a decree *a vinculo ;* and it did so, not by way of dissolving a previously existing valid marriage, but, when the facts so warranted, by making a declaratory decree to the effect that there never had been a valid marriage between the parties at all.

It cannot be open to question that a distinction has long been recognised for certain purposes between marriages which are void and those which are merely voidable. The use of the word " voidable " in connection with any marriage which is annulled has, however, been criticised on account of the retrospective form of the decree. As recently as *Adams v. Adams* (1), Scott, L.J. (at p. 541) referred to such criticism, and said that primarily the use of the words " void " and " voidable " was a metaphor from the law of contract and was not truly appropriate to the law of status ; but, he declared, the use of both terms in connection with the status of marriage has received judicial sanction. I would add that in section 9 of the Matrimonial Causes Act (Northern Ireland), 1939, they also receive legislative sanction. They are to be found in the judgment of Sir John Nichol, Judge of the Prerogative Court of Canterbury, in *Elliott v. Gurr* (2) (at pp. 18 and 19), where, using for the most part the language of Blackstone (1 Bl. Com. pp. 434, 435), he speaks of the difference between " void " and " voidable " being so clear that no person who ever looked into any elementary book on the subject is ignorant of it. Canonical disabilities, including

(1) [1941] 1 K.B. 536. (2) 2 Phill. Ecc. 16.

K.B.D. (Matrimonial) 1943.

MASON v. MASON (OTHERWISE PENNINGTON).

ANDREWS, L.C.J.

corporal infirmities, such as impotence, only make the marriage voidable, and not *ipso facto* void until sentence of nullity be obtained as it must be, if at all, during the lifetime of the parties. Civil disabilities, on the other hand, such as prior marriage, age or idiocy, make the contract void *ab initio*—not merely voidable. These latter do not dissolve a contract already made; they render the parties incapable of contracting at all. They do not put asunder those who are joined together, but they previously hinder the junction. Such a union is a meretricious, not a matrimonial one, and therefore no sentence of avoidance is necessary.

It cannot, however, be too clearly understood that, although the actual decree of nullity is requisite in the case of voidable marriages, this does not mean that the marriage was valid up to the date of such decree and only invalid thereafter. In terms the nullity decree—and these are the terms of the decree of 21st January, 1935, with which we are concerned in the present case—declares the marriage to be and to have been absolutely null and void, and that the petitioner was and is free from all bond of marriage with the respondent.

It is a form of decree which in substance has been handed down from the time of the Ecclesiastical Courts and was carefully settled by the House of Lords in *Lewis v. Hayward* (1). No doubt in the case of a voidable marriage its validity might never be questioned, and in such case it would be deemed valid, and never could be regarded as a void marriage; but, when once its validity is successfully challenged and it is declared null and void by decree absolute, the invalidity is established retrospectively as from the date of the marriage itself, and the status of husband and wife, which continued to attach to the spouses until the decree, is finally and irrevocably altered and determined. In other words, the force of the decree is that of a judgment *in rem* such as to make the marriage, which was previously voidable only, void *ab initio*—a mere form and nothing else.

(1) 35 L.J. (P.) 105.

Newbould v. Attorney-General (1), in which a declaration was sought under the Legitimacy Act, 1926, is also a helpful case. The petitioner was born in April, 1929, of parents who were married subsequently in November of the same year. His father had gone through a ceremony of marriage in 1909 with a woman who was not the mother of the petitioner, but decrees *nisi* and absolute declaring that ceremony null and void on the ground of the incapacity of the woman to consummate marriage were pronounced after the birth of the petitioner but before the second marriage. It was held by Lord Merrivale on the authority of *G. v. M.* (2), and *Napier v. Napier* (3), that the decree absolute of nullity for impotence had a retrospective operation so as to amount to a declaration that there was no marriage at all, and that it was not merely a dissolution of a previously existing marriage. A declaration of legitimacy was accordingly made.

It is further to be observed that the marriage, after such decree absolute, is void for almost every purpose; and, speaking in general terms, the only exception to the rule—an exception founded on general equitable principles—may be said to be such transactions as have been concluded and such things as have been done during the period of the supposed marriage. These cannot be undone or re-opened after the marriage has been declared null and void (Per Lawrence, J., in *Dodworth v. Dale* (4) (at p. 512). This is one of the most recent cases on the subject where the question arose upon an issue with the Revenue Authorities; but the same principle was acted upon in other cases, including *Dunbar v. Dunbar* (5), where it was held that a completed and executed transaction effected while the parties lived together in respect of which the doctrine of advancement to the wife applied was unaffected by a subsequent decree of nullity. Further illustration is to be found in the decision of the King's Bench Division in the Irish case of *P. v. P.* (6), (expressly approved of in the Court of Appeal by Molony,

(1) [1931] P. 75.
(2) 10 A.C. 171.
(3) [1915] P. 184.
(4) [1936] 2 K.B. 503.
(5) [1909] 2 Ch. 639.
(6) [1916] 2 I.R. 400.

K.B.D. (Matrimonial) 1943.

MASON v. MASON (OTHERWISE PENNINGTON).

ANDREWS, L.C.J.

L.J., at p. 442), in regard to the sum of £75, the expenditure of which by the defendant, while the plaintiff lived with him as his wife, was regarded as a concluded transaction which ought not to be disturbed. These cases, it will be observed, all affect or are directly consequent upon the established rights and relations of the husband and wife *inter se* during the period of the supposed marriage—rights resulting from completed acts attributable to the marriage relationship; and, as so applied, I respectfully accept the proposition which Lawrence, J., in *Dodworth v. Dale* (1) said at p. 519 was laid down in these authorities, namely, that what has been done during the continuance of the *de facto* marriage cannot be undone—cannot be overturned by the operation of law.

Such I understand to be the limit of the exception to the general rule that, though a marriage which is void on the ground of incapacity is voidable and not void, yet, when avoided, it is void *ab initio*. It is an exception which has obviously no relation to the issue of alleged bigamy involved in the present case. In my opinion, therefore, when the decree absolute was pronounced on 21st January, 1935, it fully established, as it purported on its face to do, the void character of the respondent's first marriage *ab initio*. Accordingly, by the retrospective effect of the decree absolute, the respondent must in my opinion be regarded as being an unmarried man on 10th January, 1935, when he married the petitioner. The petition, therefore, fails in so far as it seeks relief on the ground of alleged bigamy.

I find what I regard as strong corroboration for the view which I have expressed in the terms of section 57 of the Offences against the Person Act, 1861, relating to the crime of bigamy. This section, so far as is material for our present purposes, provides that "whosoever, being married, shall marry any other "person during the life of the former husband or "wife . . . shall be guilty of felony . . .: provided "that nothing in this section contained shall extend "to any . . . person who, at the time of such second

(1) [1936] 2 K.B. 503.

"marriage, shall have been divorced from the bond of the "first marriage, or to any person whose former marriage "shall have been declared void by the sentence of any "court of competent jurisdiction." The language of this proviso merits careful consideration for, in my opinion, it clearly recognises the essential difference in character between the decree of dissolution in divorce and the decree of nullity. In the former case the decree of divorce from the bond of the first marriage must, in order to constitute a defence to a bigamy charge, be in existence "at the time of such second "marriage," for it dissolves a valid and existing marriage as of that date; but in the case of a marriage declared void there is no stipulation as to the necessity for such declaration being in existence at the time of the second marriage; it is sufficient if at his trial the accused person is able to establish that his former marriage has at any time previously been declared void; for, when made, the decree declares that such former marriage is, and, retrospectively, that it always was void. Clearly, therefore, in the present case the respondent could not be convicted under section 57 of having committed bigamy with the petitioner.

This brings me to the last point in the case—the suggestion of the learned Attorney-General that the marriage of the petitioner and respondent should be declared null and void on the ground that at the date of his marriage with the petitioner the respondent was under a disability which prevented him from entering into a valid contract of marriage, as at that date he had not obtained his decree of annulment of his previous marriage. In connection with this submission he cited to me three cases, all of which must be carefully considered. The first is *Siveyer v. Allison* (1), in which it would appear to have been held that an agreement between a married man and an unmarried woman who knows that he is married that they will marry if and when he obtains a decree of nullity of his marriage is illegal and void as being contrary to public policy. This was not a matrimonial suit, but an action of a wholly different character—for damages

(1) [1935] 2 K.B. 403.

K.B.D. (Matrimonial) 1943.

MASON v. MASON (OTHERWISE PENNINGTON).

ANDREWS, L.C.J.

for breach of such an agreement to marry and for deceit. In the course of his judgment, Greaves-Lord, J., cites with approval the opinion of Vaughan Williams, L.J., in *Wilson v. Carnley* (1), 733 *seq.*, 736, to the effect that a married man is incapable of legally contracting to marry, and the fact that an innocent person is persuaded into purporting to make such a contract does not give rise to any claim in contract, as where there is no contract there can be no breach. The learned Judge also referred to a passage in 3 *Coke's Institutes* 1809 Ed., p. 88, c. 27, to the effect that : " If " any person . . . being married doe at any time " after marry any person . . . then every such offence " shall be felony," the author adding in a note : " This " extendeth to a marriage *de facto*, or voydable by " reason of a precontract, or of consanguinity, or of " affinity or the like : for it is a marriage in judgment " of law until it be avoided, and therefore, though " neither marriage be *de jure*, yet they are within this " statute." Greaves-Lord, J., concludes the relevant portion of his judgment by expressing the view that the doctrine of public policy applies wherever there is a subsisting marriage, and this is not altered by the fact that the decree of nullity when obtained would declare the marriage null and void *ab initio*.

Without wishing to question the soundness of this decision, or of the passage cited from Coke's Institutes as applied to the statute then in force in relation to the offence of bigamy, I may say that neither seems to me to support the present petitioner's case. On the contrary both fully recognise, as is of course the case, that such a voidable marriage ceases to be a marriage in judgment of law when it is avoided, and that such decree of nullity when obtained declares the marriage, as I have already pointed out, null and void *ab initio*. The actual decision really does not assist me in my present enquiry, as the all-important feature in the present case of a decree *nisi*, followed in due course by a decree absolute in nullity was wholly absent from the facts of that case.

The second case is the well-known decision of the

(1) [1908] 1 K.B. 729.

House of Lords in *Fender v. St. John-Mildmay* (1), in which, by a majority of three to two, it was held that a promise made by one spouse, after a decree *nisi* for the dissolution of the marriage has been pronounced, to marry a third person after the decree has been made absolute is not void as being against public policy, and an action for damages for breach of the promise is maintainable by the third person. The case is interesting not only in the finding arrived at by the majority of the Court but also for the discussion which it contains upon the limits of the doctrine of public policy and upon the effect of a decree *nisi* in a divorce action. As Lord Atkin points out at page 16, when the decree *nisi* has been made the parties are no longer living together and they are not entitled to require that conjugal rights should be restored. The *consortium* has been broken. I would also refer to two passages in the speech of Lord Thankerton, in the first of which (at p. 25) he points out that when once the decree *nisi* has been pronounced the guilt of the respondent has been judicially determined, the waiting period until decree absolute being imposed merely in the public interest; and in the second of which passages (at p. 26) he refers on the question of immorality to the vital distinction between a promise to marry on the contingency of a *dies incertus* (illustrated, I may say, by *Siveyer v. Allison* (2)) and a promise to marry on the decree *nisi*, already in existence, being made absolute. Finally, Lord Wright, referring to sanctity of contract as the basis of society, asks (at p. 36) if after decree *nisi* there is "any public interest in seeking "to preserve, at the expense of the solid detriment of "sanctioning a breach of contract, the transitory and "unsubstantial form of a marriage which by the "decree of the court is practically doomed to ex-"tinction in a brief period of months?"

On the whole case of *Fender v. St. John-Mildmay* (1), I am therefore unable to find anything which assists the petitioner on the present issue. On the contrary, one might reasonably conclude that if a promise

(1) [1938] A.C. 1. (2) [1935] 2 K.B. 403.

K.B.D. (Matrimonial) 1943.

MASON v. MASON (OTHERWISE PENNINGTON).

ANDREWS, L.C.J.

made by a spouse after a decree *nisi* of divorce to marry a third party after decree absolute is valid and legally binding, so also ought to be a marriage entered into six months after decree *nisi* for nullity of a former marriage—a decree which was confirmed a few days later by decree absolute possessing the inherent retrospective character to which I have already referred. There is no room for the application to such former marriage of what Lord Thankerton calls "the broad principle of protection of the sanctity "of the marriage tie as being one of the essential "institutions of a Christian and monogamous people."

The third case is *Fowke v. Fowke* (1). I am not so much concerned with the actual decision in that case to the effect that a decree of nullity granted on the ground of incapacity of the wife to consummate the marriage does not affect a previous deed of separation containing a covenant by the husband to pay his wife an annuity. The decision is based simply on the legal position that these two persons were for all material purposes man and wife until the date when the decree absolute was made; and an agreement entered into on that basis, at a time when there was no question of a decree of nullity, is a contract which remains enforceable even though subsequently one of the parties obtains the decree. The portion of the case to which I call special attention is one passage in the judgment of Farwell, J., at p. 779. After referring to the fact that a declaration of nullity is not merely a declaration that the marriage has been determined from a particular date or is dissolved from a particular date, but that it is a declaration that the marriage is and has been absolutely null and void, and that the petitioner was and is free from all bond of marriage with the respondent. he adds "the result "of such a decree is, *at any rate from its date*, that the "parties are not, and never have been, legally man "and wife."

The words which I have italicised are important but they are inconclusive. I am fully conscious of their

(1) (1938) Ch. 774.

possible implication. As applied to the present case the passage would suggest that the decree absolute declaring that the marriage was and is a nullity, and that the petitioner was and is free from its bonds, may not have the effect of validating or of establishing the validity of a marriage which at the time it was entered into suffered from the infirmity of the legal contractual disability of one of the parties to enter into such second marriage.

If this be the law it is, indeed, strange that the point has never been judicially determined, and that there appears to be no record, so far as I have been able to trace, of any case in which in circumstances such as the present it has been specifically pleaded. If the contention is sound it would certainly introduce a refinement or a subtlety of metaphysical reasoning into our matrimonial law which I shall loyally recognise if laid down by higher authority, but for the creation of which I shall not accept responsibility. To me it would appear to be an illogical conclusion that the absolute decree in nullity of the first marriage should operate, as I have held, retrospectively so as to prevent the second marriage being regarded as bigamous, and yet, that that second marriage should be held invalid for want of legal ability on the part of the respondent to contract merely because the formal decree absolute of nullity was not pronounced until a few days after such second marriage was celebrated.

At this stage I would wish to refer again—this time at greater length—both to the actual decision and to the judgments of the Court of Appeal in *P. v. P.* (1). Prior to and in contemplation of an intended marriage between the plaintiff, then M. McD. (the intended wife), and the defendant, T. P. (the intended husband), a sum of £475 was paid by the plaintiff to the defendant as her marriage portion, and it was agreed that £400 of this sum should be applied in paying off a charge of that amount on the defendant's lands. A ceremony of marriage subsequently took place. Some years afterwards—in January, 1915—the plaintiff presented a petition asking for a declaration of nullity of marriage

(1) [1916] 2 I.R. 400.

K.B.D. (Matrimonial) 1943.

MASON v. MASON (OTHERWISE PENNINGTON).

ANDREWS, L.C.J.

on the ground of the impotence of the defendant, and in the following month instituted this action, describing herself as M. P. and a married woman, for the recovery of the said sum of £475 as money had and received by the defendant for her use. In May, 1915, a decree of nullity was pronounced ; and in the following month she obtained an order to amend the proceedings by suing and describing herself as M. McD., a spinster. In these circumstances the Court of Appeal, affirming the King's Bench Division, held that the plaintiff was entitled, as upon a consideration that had failed, to be repaid by the defendant the said sum of £400.

As the rights of the parties to an action must be determined as of the date of the issuing of the writ, which in this case was some four months prior to the pronouncement of the nullity decree, the plaintiff could only succeed in her action if the nullity decree when made was retrospective in operation, for until it was so made and a voidable marriage had been declared void, failure of consideration could not be established. All the principal cases on the subject were cited to and considered by the Court, all of whose members referred to the form of the nullity decree which "pronounced and adjudged that the form of "marriage between the petitioner and the said T. P. "was and is null and void, and that the petitioner "M. P., otherwise M. McD., is free from all bond of "marriage with the said respondent."

At p. 424 Sir Ignatius O'Brien, L.C., after referring to the presumption that a marriage is good until it is set aside, proceeds to say that: "once the Court "considers that the party seeking relief has not done "anything which prevents him or her obtaining the "relief sought, and the impotency of the other party "is proved, it pronounces a decree declaring the "marriage to be a form only, and to be absolutely "null and void *at the time it*" (*i.e.*, the marriage) "*pur-*"*ported to be effected* and from that time on." He follows this up (at p. 425) by saying that it was "well "settled that once the decree is pronounced the "marriage is void *ab initio and was never anything* "*but a form.*" Again, at p. 426, he says that: "once

" the decree of nullity is pronounced the marriage is " void *from the date of the ceremony.*" Finally, at p. 427, he states in terms which to me are very helpful in this case that : " Once the decree of nullity was " pronounced it operated in such a manner on her status " that she was rightly treated by the Court" (*i.e.*, the King's Bench Division) " as being an unmarried " woman *at the date of issuing the writ.*"

The judgment of Ronan, L.J., is upon precisely similar lines. My first citation from his judgment will be found at p. 429 of the report : " Neither in the " Spiritual Court nor the Civil Court was there such a " theory as a marriage valid up to a certain time and " thenceforward void. This could only arise under " a special Act of Parliament. Apart from such an " Act the parties were either never married or married " for ever, and this was so both in the Spiritual and " Temporal Courts." At p. 430 he refers to the canonical disabilities, including corporal infirmities, only making the marriage voidable and not *ipso facto* void " *until* sentence of nullity be obtained." On page 431 he follows this up with a citation from Blackstone (1 Bl. Com., pp. 434, 435) which he says : " shows clearly that the word ' until ' does not mean " that the marriage was valid up to the date of the " decree, and only invalid from that date, but that " the declaration of ' such marriage to have been void ' " meant void *ab initio*, and that the effect of the " declaration was to bastardize the issue of the marriage " born at any time." Later on the same page he adds that : " the fact that the effect of the decree is to " bastardize the issue born at any time is conclusive " that the parties were never united in lawful matri- " mony, and that there never was at any time a lawful " marriage." Finally, after examining several of the reported cases, he sums up the legal position by saying, at p. 439 :—" We have, therefore, laid down by Lord " Halsbury, C., A. L. Smith, M.R., Vaughan Williams, " L.J., and Gorell Barnes, J. :—1. That the effect " of the sentence in such a case as this has the same " operation on a marriage contract as if the marriage " was *ipso facto* void ; for this is the effect of holding

K.B.D. (Matrimonial) 1943.

MASON v. MASON (OTHERWISE PENNINGTON)

ANDREWS, L.C.J.

"the case governed by *Chapman v. Bradley* (1). "2. That this simply means that there is no distinction "between a so-called 'voidable' and a 'void' "marriage, once the decree of nullity is made."

It may be that this case of *P. v. P.* (2) does not conclusively rule the issue which I am called upon to determine; but, if it does not, it goes at least a long way towards it. In it the plaintiff's right to maintain the action was established by the retrospective operation of a nullity decree pronounced four months after the commencement of the action; and this was simply the logical result of the decree, the marriage never being anything but a mere form, and being void from the date of the ceremony. In my opinion it is in no way more difficult to hold in the present case that such infirmity as may have existed in the respondent's legal right to contract a new marriage prior to the formal pronouncement of a decree absolute was entirely removed by the retrospective operation of this decree when made. In the light of subsequent events it was an infirmity which was more apparent than real—at most—a temporary impediment, though not even recognised as such, rather than a permanent barrier. It would be quite inconsistent for me to hold, as I must do on the authorities, that the former marriage was void from the date of the ceremony, and yet that that same former marriage created in the respondent a legal disability to contract a new marriage several years later. In determining the issue it is my duty, as I conceive it, to have regard to the rights and position of the parties at the time of the issuing of the petition in the present nullity suit, and not to consider merely what the strict position might possibly have been if, as was of course impossible, that issue could have been brought before the Court prior to the pronouncement of the decree of nullity of the respondent's first marriage. I am called upon to adjudicate in this case in the year 1944; and I find not only that on the date of the respondent's impugned second marriage his first voidable marriage had been already the subject of a decree *nisi* in nullity, but that this decree *nisi* had been

(1) 4 De G. J. & S. 71. (2) [1916] 2 I.R. 400.

made absolute prior to the institution of this present cause. That marriage had thereby been declared in effect to be a mere form—what was previously voidable had become and still remains absolutely void. To hold the second marriage void by a declaration which had regard merely to contractual rights as they existed on 10th January, 1935, would be to determine the matter on a wholly incomplete state of facts as they existed at the date of the institution of these proceedings.

One text book writer, Geary, in his standard work on *Marriage and Family Relations*, deals with the subject at pp. 34 and 220, expressing the view that an intervening marriage, subsequent to a voidable marriage, and previous to a decree absolute of nullity, would *perhaps* be validated by the retrospective effect of the decree. This statement is queried by the editors of the 4th edition of *Rayden on Divorce* who refer to section 57 of the Offences against the Person Act, 1861, which I have already cited in an earlier portion of this judgment. The views which I there expressed as to what I conceive to be the true construction of that section of the Act need not now be referred to further than to say that in my opinion the section supports the opinion suggested by Geary—an opinion which in my judgment is correct.

It may no doubt be urged that certain unfortunate results may follow from the views which I have expressed ; but in my opinion no such results would be as serious, or may I say, as disastrous as would be the bastardizing of the child born to the petitioner and respondent fourteen and a half months after their marriage had been solemnized ; yet, as the case does not fall within section 9 (2) of the Matrimonial Causes Act (Northern Ireland), 1939, this would, it seems to me, be the necessary legal consequence of the pronouncing of the decree of nullity which the mother of this child seeks, and against the making of which the father, equally regardless of his child's interests, has raised no voice of protest. I am, indeed, glad that in a case containing no element of pre-marriage deception by one spouse upon the other,

K.B.D. (Matrimonial) 1943.

MASON v. MASON (OTHERWISE PENNINGTON).

ANDREWS, L.C.J.

and which at its highest is based, without in my opinion the slightest vestige of merits, on pure legal technicality, I find no legal compulsion upon me to effect such a grievous wrong.

For all these reasons I hold on the entire case that, whilst I have jurisdiction to hear the petition, it must be dismissed. There will be no order as to costs.

Solicitors for the petitioner: *Hugh C. O'Doherty & Son.*

M.V.P.

INDEX

APPEAL TO QUARTER SESSIONS 91
See CUSTOMS.

CARRIAGE OF GOODS BY SEA—*Loss of Goods—Conditions of shipment safeguarding shipowners—Validity—Carriage of Goods by Sea Act*, 1924 (14 & 15 *Geo.* 5, *c.* 22), *sec.* 3 *and Schedule, Article* 6. The plaintiffs in Belfast delivered goods to the defendants for carriage to Scotland, with a consignment note and the defendants' form of receipt for the goods; both documents embodied the defendants' conditions of carriage, and both were marked "Non-negotiable." The receipt was signed on behalf of the defendants and was returned to the plaintiffs. No bill of lading was issued. The goods were lost in transit. The conditions of carriage, if valid, were sufficiently wide to protect the defendants from liability for the loss of the goods. In an action for damages for loss of the goods. *Held*: 1. That the Carriage of Goods by Sea Act, 1924, did not apply to the case because the receipt given was not a "bill of lading or similar document of "title." 2. That section 4 of the Carriage of Goods by Sea Act, 1924, modifies Article VI of the Schedule to the Act in the case of the carriage by sea from any port in Great Britain or Northern Ireland to any other port in Great Britain or Northern Ireland, or to a port in Eire, and in such a case a carrier and a shipper are at liberty in regard to goods of any class, to enter into any agreement in any terms as to the responsibility and liability of the carrier for such goods, and as to his rights and immunities in respect of them, including a stipulation as to seaworthiness so far as the stipulation is not contrary to public policy, provided that no bill of lading is issued and that the terms agreed are embodied in a receipt which is a non-negotiable document and is marked as such, and that the defendants were not liable. Hugh Mack & Company, Ltd., *v.* Burns & Laird Lines, Ltd. (1943) N.I. 26, not followed. *Hugh Mack & Co., Ltd. v. Burns & Laird Lines, Ltd.* .. .. .. C.A. 106

CHARITY—*Gift subject to condition to keep grave in order* 28
See WILL.

CUSTOMS—"*Criminal cause or matter*" 91
See CRIMINAL CAUSE OR MATTER.

"CRIMINAL CAUSE OR MATTER"—*Customs—Dealing with prohibited goods—Proceedings for recovery of penalty—Dismiss at Petty Sessions—Appeal to Quarter Sessions—"Criminal cause or matter"—Customs Consolidation Act*, 1876 (39 & 40 *Vict.*, *c.* 36), *s.* 186—*Customs and Inland Revenue Act*, 1879 (42 & 43 *Vict.*, *c.* 21), *ss.* 11, 12—*Finance Act*, 1935 (25 & 26 *Geo.* 5, *c.* 24), *s.* 15—*Import, Export and Customs Powers (Defence) Act*, 1939 (2 & 3 *Geo.* 6, *c.* 69), *s.* 3 (1)—*Export of Goods (Control) (No.* 19) *Order*, 1941. An information was laid against the defendant charging him with being knowingly concerned in dealing with certain goods with intent to evade the prohibitions applicable thereto contrary to section 186 of the Customs Consolidation Act, 1876, and to the Export of Goods (Control) (No. 19) Order, 1941, whereby he incurred penalties and the goods were forfeited under the Import, Export and Customs Powers (Defence) Act, 1939, sec. 3 (1). The summons was dismissed at Petty Sessions. On appeal by the complainant to Quarter Sessions, the County Court Judge held that such appeal lay, he held that the charges were proved, and imposed penalties with an alternative of imprisonment. On a Case Stated as to whether an appeal lay to Quarter Sessions against the order made at Petty Sessions. *Held*, that the proceedings did not constitute a criminal cause or matter, and that an appeal lay to Quarter Sessions. *Firman v. Malocca* .. .. .. C.A. 91

EMPLOYMENT—RATE OF PAY—TRADE UNION—*Arbitration* .. 48
See ROAD AND RAILWAY TRANSPORT ACT, 1935.

EVIDENCE—*Statement by defendant—Admission of whole statement* .. 7
See NEGLIGENCE 1.

"FACTORY" 37
See NEGLIGENCE 2.

GAMING AND WAGERING—*Automatic machines for the purpose of gaming—Gaming Act*, 1845, *secs.* 3, 4, 8—*Gaming Houses Act*, 1854, *sec.* 4—*Power of Justice of the Peace to issue search warrant—"Other instruments of "gaming"—No notice of application for order for destruction of automatic gaming machines—Jurisdiction to grant such order.* The defendants each carried on an amusement business in premises open to the public and containing a number of automatic "penny in the slot" machines which members of the public resorting to the premises used for playing games of chance. The premises were each searched by the police under warrants issued under the Gaming Act, 1845, by a Justice of the Peace, who took depositions at a Special Court and remanded the defendants on bail to attend the Petty Sessions Court. The defendants were each charged with: (1) unlawfully keeping a common gaming house contrary to the Gaming Act, 1845, no summons having been issued in respect of this charge, and (2) using the premises for unlawful gaming contrary to the Gaming Houses Act, 1854, section 4. At Petty Sessions the defendants were each convicted on both charges and fined and it was ordered that the automatic machines be destroyed. On appeal to Quarter Sessions the convictions and penalties and the orders for the destruction of the automatic machines were affirmed. On Cases Stated by the County Court Judge. *Held*, (1) A Justice of the Peace has jurisdiction to issue a warrant under the Gaming Act, 1845, section 3, because he had by law "authority to enter any "house . . . where unlawful games "shall be suspected to be holden" by virtue of the Irish Statute, 13 Geo. II, c. 8, and the Gaming Act, 1802 (42 Geo. III, c. 119). (2) Automatic machines for the purpose of playing games of chance and used for that purpose are instruments of gaming within the meaning of the Gaming Act, 1845, section 8, and as the defendants were each represented by counsel at Petty Sessions the orders for the destruction of the machines were valid, notwithstanding that no notice was given to either defendant of any intended application for such an order. (3) The convictions against the defendants under the Gaming Houses Act, 1854, section 4, should be quashed as being for substantially the same offences as those charged under the Gaming Act, 1845. *Cullen v. Dale: Cullen v. Bracewell* [C.A. 78

HABEAS CORPUS—*Applicant sentenced to penal servitude for three years from date of his arrest—Legality of sentence—Remedy under Criminal Appeal (Northern Ireland) Act*, 1930 (20 & 21 *Geo.* 5, *cap.* 45). The Court of King's Bench will not in general grant a writ of habeas corpus to bring up a prisoner under a sentence, alleged to be illegal imposed by a Superior Court. The proper method of reviewing such a sentence is by appeal under the Court of Criminal Appeal (Northern Ireland) Act, 1930. *In re Beggs* .. [K.B.D. 121

HUSBAND AND WIFE .. 1
See LIMITATIONS.

INCOME TAX—SAND-PIT—*Income Tax Act*, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Schedule A*, *No.* 3, *rule* 3—"*Other "concerns of the like nature.*" The respondent owned a sand-pit and he permitted persons to come upon his land, dig the sand and carry it away, paying him for it at prices varying from sixpence to ninepence per ton according to the quality; these payments were made without deduction of Income Tax. The respondent employed a man to keep records of the amount of sand taken; he took no part himself in winning the sand, but simply managed the pit. The respondent was assessed to income tax in respect of the sums so paid to him. *Held*, that Schedule A of the Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40), No. 3, rule 3, did not apply to the case. *Russell, Appellant, Scott, Respondent.* .. .. [C.A. 57

JURISDICTION—NULLITY OF MARRIAGE 134
See MARRIAGE.

JUSTICES—*Summons for penalty for breach of* 00

JUSTICES—CUSTOMS ACTS—*Dismiss—Appeal to Quarter Sessions* 91
See CRIMINAL CAUSE OR MATTER.

JUSTICES—JURISDICTION TO ISSUE SEARCH WARRANT .. 78
See GAMING AND WAGERING.

JUSTICES—GAMING MACHINES—ORDER FOR DESTRUCTION—NO NOTICE OF APPLICATION FOR 78
See GAMING AND WAGERING.

LIMITATIONS—HUSBAND AND WIFE—*Husband ceasing to live on lands—Wife and children in exclusive possession for statutory period—Local Registration of Title (Ireland) Act*, 1891, *sec.* 52. The owner of lands registered under the Local Registration of Title (Ireland) Act, 1891, lived on the lands with his wife and his two children until 1928, when, owing to disagreements with his wife, he left with his wife's approval and went to live elsewhere; he never returned to the lands and he and his wife never afterwards spoke to one another. His wife and the children continued to live and work on the lands, and continuously remained, and still were, in exclusive beneficial occupation and receipt of the profits thereof without any claim being made by the registered owner, or any acknowledgment of right being given to him. The wife of the registered owner, claiming that but for the provisions of the Local Registration of Title (Ireland) Act, 1891, she would have acquired a title to the lands by possession, applied to the Court under sec. 52 of that Act for an order declaring her title to the lands and ordering the register to be amended accordingly. *Held*, by the Court of Appeal, that but for the provisions of the Local Registration of Title (Ireland) Act, 1801, the right of the registered owner would have been statute-barred, and that the wife or, as the Court thought, the wife and the two children, would have acquired a title by possession to the lands. *In re Michael Daily* .. .. [C.A. 1

MARRIAGE—DECREE NISI OF NULLITY OF MARRIAGE—*Remarriage of one of the parties before decree made absolute—English domicil—Residence in Northern Ireland—Nullity suit—Jurisdiction—Effect of decree absolute.* On 10th July, 1932, a ceremony of marriage was celebrated between the respondent and one N. By a decree *nisi* of the High Court of Justice in England made on 10th July, 1934, the marriage was declared null and void by reason of the incapacity of N. to consummate it; this decree was made absolute on 21st January, 1935. On 10th January, 1935, N. being still alive, a ceremony of marriage was celebrated in Scotland between the petitioner and the respondent. In 1940 the respondent obtained employment in Northern Ireland and came to reside there. On 30th December, 1942, the petitioner presented a petition for a declaration that the ceremony of marriage celebrated between her and the respondent was null and void on the ground that the respondent's marriage with N. was still valid and existing when he went through the ceremony of marriage with the petitioner; at the time when the petition was presented both parties were resident in Northern Ireland but were domiciled in England. *Held:* (1) That the residence of the parties in Northern Ireland was sufficient to found the jurisdiction of the Court to declare the marriage null and void. (2) That the decree absolute in the nullity suit between the respondent and N. was retrospective in effect and so precluded the finding that the respondent was a married man at the date of his marriage to the petitioner on 10th July, 1935. (3) That the respondent was not under any legal disability preventing him from contracting a valid marriage with the petitioner on 10th January, 1935; and accordingly (4) That the marriage between the petitioner and the respondent was lawful and valid. Petition dismissed. *Mason v. Mason (Otherwise Pennington)* 134
[ANDREWS, L.C.J.

MASTER AND SERVANT—*Child permitted by servant to ride on tractor—Negligence of servant—Liability of master.* A man employed by the defendant Cairns to drive a tractor permitted the plaintiff, a boy aged ten years, to ride with him along the public road, on the tractor which for passengers was an unsafe vehicle on which to ride. While the man was driving the tractor the plaintiff, owing to the driver's negligence, fell from it and was injured. In an action against Cairns and the driver for damages for negligence in the driving of the tractor. *Held*, that Cairns was not liable. *Nixon v. Cairns*
[ANDREWS, L.C.J. 21

MASTER AND SERVANT—Rate of pay—Trade Union—Arbitration 48
See Road and Railway Transport Act (N.I.), 1935.

NEGLIGENCE—*Statements made by defendants the only evidence of negligence given on behalf of the plaintiff—Admissibility of whole statement—Onus of proof.* The plaintiff's daughter was killed by a lorry driven on the public road by one of the defendants. At the trial of an action brought by the plaintiff claiming damages for the negligent driving of the lorry, the only evidence of negligence consisted of certain statements made by the defendants to the effect that two little boys having run from behind a motor car travelling in the opposite direction, the driver of the lorry was obliged to swerve in order to avoid hitting them, and in doing so struck the plaintiff's daughter who was cycling from a side street on to the road on which the lorry was travelling. At the close of the plaintiff's case the trial judge held that the statements were not admissions of negligence, that they pointed to inevitable accident, and that the plaintiff had not discharged the onus of proof, and gave judgment for the defendants. *Held*, that the plaintiff had established a *prima facie* case of negligence, and that the statements of the defendants, whether in favour of the plaintiffs or the defendants, were admissible in evidence *in toto*, and that there should be a new trial of the action. *McBride v. Stitt* .. .. .. [C.A. 7

NEGLIGENCE—Servant permitting child to ride on tractor 21
See Master and Servant.

NEGLIGENCE—Employer and Workman — "*Factory*" — *Factories Act* (2 *Geo.* 6, *c.* 23 (*Northern Ireland*)), *sec.* 157—*Dangerous employment—Duty of employer to provide for safety of workman—Maxim* "*Volenti non fit injuria.*" A workman was employed by the defendants at a pumping station in connection with their sewerage system. At the pumping station sewage was discharged into tanks in which the solid matter sank to the bottom; the liquid was pumped off, and then the solid matter was pumped into barges from which it was discharged into the sea. On 16th December, 1942, the workman started work at six a.m.; a gale was then blowing and it was raining heavily. His first duty was to inspect certain tanks containing sewage: while doing so he was drowned in one of the tanks. The route to the tanks was along a path on both sides of which as far as the tanks there was a fence three feet high, but along the side of the tank in which the man was drowned there was no fence; the wall of the tank was level with, or about one inch above the level of, the path; it contained about six feet of sewage. In an action brought by the workman's widow and administratrix for damages for negligence and for breach of statutory duty under the Factories Act (Northern Ireland), 1938, sec. 27. *Held* (by Brown, J.):—1. That the pumping station was not a "factory" within the meaning of the Factories Act (Northern Ireland), 1938. 2. That the work was of a dangerous character and that the defendants did not use all reasonable precautions for the protection of the workman 3. That the maxim "*Volenti non fit* "*injuria*" did not apply and that the plaintiff was entitled to recover damages. *McIlhagger v. Belfast Corporation.* .. [Brown, J. 37

NULLITY OF MARRIAGE—Decree *nisi*—Effect of decree absolute 134
See Marriage.

PETTY SESSIONS—Appeal to Quarter Sessions .. 91
See Criminal cause or matter.

PETTY SESSIONS—Gaming Machines. 78
See Gaming and Wagering.

ROAD AND RAILWAY TRANSPORT ACT (NORTHERN IRELAND), 1935 (25 & 26 *Geo.* 5), *sec.* 29, *sub-s.* 2—*Question in respect of rates of pay of employees—Refusal of Board to negotiate with trade union of which the employees were members—Conditions of Employment and National Arbitration Order* (*Northern Ireland*), 1940 (*S. R. & O.* 1940, *No.* 1508)—*Mandamus.* 1. Persons employed by the Northern Ireland Road Transport Board who are members of a Trade

Union have under sec. 29, sub-sec. 2 of the Road and Railway Transport Act (Northern Ireland), 1935, a statutory right to require matters in dispute between themselves and the Board in respect of rates of pay, hours of employment or other conditions of employment, to be referred for settlement by direct negotiation between the Board and the Trade Union in accordance with the provisions of that section. 2. Notwithstanding the said right conferred by the Road and Railway Transport Act (Northern Ireland), 1935, such disputes may be reported to the Ministry of Labour by a party to the dispute to be dealt with under the provisions of the Conditions of Employment and National Arbitration Order (Northern Ireland) 1940 (S.R. & O., 1940, No. 1508) and to be referred for settlement, if necessary, to the National Arbitration Tribunal (Northern Ireland) established by the said Order. R. v. National Arbitration Tribunal and others [1943]2 All E.R. 162 followed. 3. Inasmuch as the procedure under the Conditions of Employment and National Arbitration Order (Northern Ireland), 1940, provides a remedy not less beneficial convenient and effective than the procedure under section 29 of the Road and Railway Transport Act (Northern Ireland), 1935, the Court in the exercise of its discretion will not direct the issue of a Writ of Mandamus to compel the Board to enter into negotiations in accordance with the provisions of that section. *R. (Hendron) v. Road and Railway Transport Board* . [K.B.D. 48

STATUTES—
——23 HENRY 8, c. 9 137
——33 HENRY 8, c. 1, s. 9 .. 83
See GAMING.
——33 HENRY 8, c. 9, s. 9. .. 80
See GAMING.
——29 CAR. 2, c. 7, s. 1 76
See INCOME TAX.
——10WM. 3, c. 11 (IRISH) .. 84
See GAMING.
——6 ANNE, c. 17 (IRISH) .. 84
See GAMING.
——11 ANNE, c. 6 (IRISH) .. 84
See GAMING.
——12 GEO. 2, c. 28 84
See GAMING.
——13 GEO. 2, c. 8 (IRISH) .. 82
See GAMING.
——42 GEO. 3, c. 119 80
See GAMING.
——4 GEO. 4, c. 60, s. 59 .. 80
See GAMING.
——8 & 9 VICT., c. 87, s. 46 .. 98
See GAMING.
——8 & 9 VICT., c. 109, s. 3 .. 81
See GAMING.
——14 & 15 VICT., c. 93 99
See CUSTOMS.
——16 & 17 VICT., c. 119, s. 2 .. 81
See GAMING.
——17 & 18 VICT., c. 38, s. 2 .. 81
See GAMING.
——26 & 27 VICT., c. 87, ss. 15-19 32
See WILL.
——27 & 28 VICT., c. 54 137
See MARRIAGE.
——28 & 29 VICT., c. 104, s. 35 .. 100
See CRIMINAL CAUSE OR MATTER.
——32 & 33 VICT., c. 42, s. 21 .. 137
See MARRIAGE.
——33 & 34 VICT., c. 110, ss. 7, 13 137
See MARRIAGE.
——39 & 40 VICT., c. 36, s. 186 .. 91
——40 & 41 VICT., c. 57, s. 21 .. 137
See MARRIAGE.
——42 & 43 VICT., c. 21, ss. 11, 12 91
See CRIMINAL CAUSE OR MATTER.
——52 & 53 VICT., c. 63, s. 33 .. 81
See GAMING.
——54 & 55 VICT., c. 21, s. 1 (1) 32
See WILL.
——54 & 55 VICT., c. 66, s. 52 .. 1
See LIMITATIONS.
——60 & 61 VICT., c. 30, s. 1 .. 87
See GAMING.
——4 EDW. 7, c. 8, s. 6 (4) .. 32
See WILL.
——8 & 9 GEO. 5, c. 40, Sch. A. .. 57
See INCOME TAX.
——14 & 15 GEO. 5, c. 22, s. 4 .. 106
See CARRIAGE OF GOODS BY SEA.
——25 & 26 GEO. 5, c 13 (N.I.), s. 3 (2) 85
See GAMING.
——25 & 26 GEO. 5, c. 15 (N.I.), s. 29 (2) 48
See ROAD AND RAILWAY TRANSPORT ACT.
——25 & 26 GEO. 5, c. 24, s. 15 .. 91
See CRIMINAL CAUSE OR MATTER.
——2 GEO. 6, c. 23, s. 157 .. 37
See NEGLIGENCE.
——2 & 3 GEO. 6, c. 13 .. 138

STATUTORY RULES AND ORDERS—
——CONDITIONS OF EMPLOYMENT

STOCK
1017

AND NATIONAL ARBITRATION ORDER (NORTHERN IRELAND), 1940 48
——EXPORT OF GOODS (CONTROL) ORDER, 1941 91

SENTENCE — ILLEGALITY OF — *Remedy* 121
See HABEAS CORPUS.

TRADE UNION 48
See ROAD AND RAILWAY TRANSPORT ACT (N.I.), 1935.

TRUSTEE SAVINGS BANKS 28
See WILL.

WILL—*Construction*—"*All my interest* "*in the fruits and benefits contained in* "*my ground rents*"—"*British Govern-* "*ment Securities*"—*Moneys deposited in Trustee Savings Bank—Gift to charity subject to condition that they will keep grave in order—Conditional gift or trust for perpetual maintenance—Direction to sell real estate—Proceeds of sale not disposed of—Real or personal estate.* A testator directed his executors and trustees to sell his house property and place the purchase money in the bank upon deposit, but did not indicate the object of the conversion. He left and bequeathed to a certain charity, in the will called "the "Cripples' Homes," all his interest in the fruits and benefits contained in his ground rents and British Government Securities provided it should be accepted subject to the condition that they should keep his grave and tombstone in order to the satisfaction of his trustees and next-of-kin, and future representatives. The house property was freehold. Part of the assets consisted of money deposited in a Trustee Savings Bank. *Held*:—1. That the testator's entire interest in the ground rents passed under the gift to the charity. 2. That the money on deposit in the Trustee Savings Bank did not pass under the gift of "British Government Securities." 3. That the gift to the charity was a valid charitable gift on a condition which was not legally enforceable. 4. That the heir-at-law was entitled to the proceeds of the sale of the house property. *In re Galway. Galway v. Incorporated Cripples' Institutes* .. .. .. [CH.D. 28

BIBL. LONDIN. UNIV.